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REPORTS
OF CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE

FOR THE
MIDDLE DIVISION,
December Term, 1898;
AND FOR THE
WESTERN DIVISION,
April Term, 1899.

GEORGE W. PICKLE,
ATTORNEY-GENERAL AND REPORTER.

VOLUME XVIII.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE

FOR THE

MIDDLE DIVISION.

NASHVILLE, DECEMBER TERM, 1898.

FLETCHER v. RAILROAD.

(Nashville. January 14, 1899.)

- 1. CHARGE OF COURT.** *Request for special instructions limited to the pleadings.*

Requests for special instruction must be limited to the case made by the pleadings. Hence, in a servant's action against his master to recover for personal injuries inflicted by a fellow-servant, the Court's refusal of plaintiff's request to charge upon the subject of sudden emergency is not error, in the absence of any averment of that fact in the declaration. (*Post*, pp. 4, 5.)

Cases cited and approved: *Coal Co. v. Daniels*, 100 Tenn., 66, 79; *Oil Co. v. Shamblin*, 101 Tenn., 263.

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2. SAME. *Putting hypothetical case.*

It is not an invasion of the province of the jury for the Court to instruct the jury hypothetically upon a theory or aspect of the case presented by the evidence, leaving the jury free to determine whether the evidence supports the hypothesis. (*Post*, pp. 5, 6.)

3. SAME. *Contributory negligence that defeats recovery for injury by fellow-servant.*

In a servant's action against his master for personal injury inflicted by a fellow-servant, it is not error for the Court to charge that the plaintiff cannot recover, even if the fellow-servant was incompetent, if that fact was as well known to the plaintiff as to the defendant, and the plaintiff sought or accepted service with knowledge of that fact, without protest or objection. (*Post*, p. 7.)

FROM DAVIDSON.

Appeal in error from Circuit Court of Davidson County. J. W. BONNER, J.

STEGER, WASHINGTON & JACKSON for Fletcher.

SMITH & MADDIN for Railroad.

WILKES, J. This is an action for damages for personal injuries. There was a trial before a jury in the Court below, and a verdict and judgment for the defendant, and plaintiff has appealed and assigned errors.

The plaintiff was a machine helper in the defendant's employ, and was injured while removing the head from a cylinder on the left side of engine No.

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249 in the roundhouse of the defendant company. Plaintiff was ordered to do this work by Brewington, the night foreman. Evidence is introduced to show that he was told to do it in a hurry, as the engine might be ordered out at any moment. On the other hand, defendant insists that he was only told to do the work, but was not directed to be in any haste about it. There is some evidence tending to show that such work required two men to do it, but the weight is that it could be, and was often, done by one man. Plaintiff asked the question, when told to do the work, who was to help him, and the foreman replied, "Ollie Rollins," and this question and answer appears to have been repeated. Plaintiff made no protest or objection. It appears that Rollins was a young man about nineteen years old, employed as a call boy, whose duty it was to go after employes and notify them when their services were desired at the roundhouse. In removing the cylinder head a number of screws had to be loosened and the head let down on the ground, either by permitting it to fall a distance of about two feet or by lowering it with a plank. It is insisted that Rollins, in manipulating this plank, twisted it to one side and caused the head, which is a heavy piece of iron or steel, to fall on plaintiff's foot and crush it.

The plaintiff's theory is that he was ordered to do this work by his superior; that an inexperienced and incompetent helper was furnished

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him, and that there was an emergency which required the work to be hastily done, and that in consequence of Rollins' negligence he was hurt.

The assignments are wholly to the charge of the Court. It is said the Court stated defendant's theory of the case, but failed and declined to state that of plaintiff. This, we think, is only partially correct. The Court stated plaintiff's theory, and, so far as he went, stated it correctly, but declined to charge that part of the case made by plaintiff which set up the sudden emergency feature because it was not alleged in the declaration. The declaration does not make any statement as to there being a sudden emergency which necessitated hasty work, though there is some evidence bearing on this question. As we understand plaintiff's position on this feature, it is that it was only necessary for him to allege negligence; that if the defendant insisted that the assistant's incompetency was known to the plaintiff, that would be matter of defense to which plaintiff might reply that the work was done under an emergency which did not give him the opportunity and right to object to the assistant, and it was not necessary, in the first instance, to allege there was an emergency. We think, in the first place, that the incompetency of Rollins is not shown in this case. The work he was required to do was not that of an expert, but was simple. The taking off of the head was not a work of difficulty, and could be, and often was, done by a single person, and the

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evidence is that it was done by Rollins alone soon thereafter. It may be that he was somewhat inexperienced, but inexperience alone does not make a man incompetent. If this were so, the class of experienced men being once exhausted, there could never be another, as any new man would be incompetent, and could not be experienced till after a service of incompetency. But, in addition, we are also of opinion the Court was correct in not charging upon this feature of sudden emergency, inasmuch as no such feature was presented in the plaintiff's declaration, nor does the case, in our opinion, show any emergency. We think the case most nearly in point in this matter is *E. Tenn. Coal Co. v. Daniels*, 16 Pickle, 66, 79, the gist of which is that the ground of recovery must be specifically set out in the declaration, and its absence cannot be cured by proof alone. See, also, *Chatt. Cotton Oil Co. v. Shamblin*, 101 Tenn., 263. Assignment No. 3 is to the effect that the Court erred in refusing to charge request No. 1. This request is, no doubt, good law abstractly, and was, in substance, charged by the Court.

It is next said it was error not to charge that the mere fact that plaintiff remained in the service of defendant and did the work with knowledge of the incompetency of this fellow-servant will not necessarily and as a matter of law exonerate the defendant from liability. The Court deemed this sufficiently charged. It was important to the plaintiff

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only as carrying out the idea of being required to act in a sudden emergency as an excuse why he should not be held responsible for his knowledge of Rollins' incompetency, and this view of the case was not, as the Court held, raised by the pleadings.

It is said the Court erred in selecting various isolated pieces of evidence and making the case turn upon them and in this manner invading the province of the jury.

The first specific objection under this head is in substance that if Rollins placed the plank by plaintiff's direction in an unsafe manner which directly caused or contributed to the accident, there then could be no recovery. This did not assume the facts to be as stated, but put a hypothetical case to the jury, and was warranted by the evidence. Again, it is objected that the Court said to the jury that if plaintiff was warned by the foreman to move his foot or it might be crushed, and that he disregarded the warning and could have escaped by heeding it, he could not recover. We think there is no error in this. There is evidence that such warning was given. It is not claimed it was acted upon. It is said that he might not have been able to move his foot or might not have understood the order, but these criticisms are not supported by the record.

The assignments in regard to the stud not being in place and the use of the monkey wrench are not well taken. We do not understand the charge to

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be that these matters were to be considered alone, but in connection with the other facts in the case, and the liability is made to depend on the whole record, and these features are referred to as important in the case, and, if true, as determining the right of the plaintiff to recover in connection with the other facts in the record.

It is said it was error to charge that if plaintiff's knowledge of the competency or incompetency of Rollins was equal to that of defendant, there could be no recovery if he asked for or accepted his assistance without protest or objection. This, we think, is good law. If a servant know that he is working with defective tools or unsafe appliances, or with incompetent fellow-servants and have the same knowledge as the employer, and he make no objection, but continue to work, he is not entitled to recover because of injuries arising out of such defects or incompetency. Wood's Master and Servant, Secs. 419, 422; Bailey's Master and Servant, Sec. 422.

Upon the whole case we do not find evidence of the incompetency of Rollins, and if in fact he was incompetent, it was as well known to the plaintiff as to the defendant company, and he was accepted by plaintiff as his helper without objection. There is evidence strongly tending to show that plaintiff adopted a dangerous plan of taking off the cylinder head; that he placed his foot in danger and was warned to move it by the foreman, and that he

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did not do so. We think there is abundant evidence to sustain the verdict. We do not find that there was an emergency existing which required any unusual risk and none is charged in the declaration.

We are therefore of opinion the judgment is correct, and it is affirmed with costs.

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SHARP v. STATE.

(Nashville. January 14, 1899.)

1. PARDON. *For contempt.*

The Governor has the right, in the lawful exercise of the pardoning power, to release judgment for fine and imprisonment imposed for contempt of Court. (*Post*, pp. 10-15.)

Constitution construed: Art. III., Sec. 6.

Cases cited and approved: *Garrett v. State* (oral opinion); *McCarthy v. State* (oral opinion); 24 La. Ann., 119 (S. C., 13 Am. Rep., 115); 4 S. & M. (Miss.), 751; 7 Blatch., 23 (17 Fed. Cases, 969).

2. SAME. "*After conviction.*"

A judgment imposing fine and imprisonment for contempt is a "conviction" within the meaning of the constitutional provision authorizing the Governor to grant pardons and reprieves "after conviction." (*Post*, p. 11.)

Cases cited and approved: *Sinnott v. State*, 11 Lea, 281; *Harwell v. State*, 10 Lea, 544; 20 Wall., 387; 6 Fed. Rep., 64.

FROM DAVIDSON.

Appeal in error from Second Circuit Court of Davidson County. JOHN W. CHILDRESS, J.

ROBERT VAUGHN and J. A. PITTS for Sharp.

STEGER, WASHINGTON & JACKSON and ESTES & ESTES for State.

MCALISTER, J. This record presents the single question of the right of the Governor to exercise

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the pardoning power in respect of fines and imprisonment imposed for contempt of Court.

It appears from the record that one W. A. Cason was under indictment in the Criminal Court of Davidson County for making false and fraudulent entries in the books of his employers. When the jury was being summoned by an officer of the Court for the trial of W. A. Cason, his father, J. D. Cason, sought to have certain individuals, whose names were handed the officer, summoned. This misconduct on the part of J. D. Cason was reported to the Judge, who, upon investigation of the facts, adjudged the contemnor guilty of an attempt to pack the jury, and fined him fifty dollars and sentenced him to jail for a period of ten days. It appears that the Court suspended its judgment in the case from June 20 until July 9, 1898. On the eighth day of July, 1898, the Governor pardoned the said J. D. Cason of said offense.

The Judge of the Criminal Court, conceiving that the pardoning power of the Executive did not extend to cases of contempt, refused to recognize the pardon and ordered the prisoner into custody. Thereupon the prisoner, through his counsel, applied to the Circuit Court for the writ of *habeas corpus*. Upon an investigation of the case the Circuit Judge was of opinion the prisoner was entitled to his liberty, and he was accordingly discharged. The Sheriff appealed, and has assigned as error the action of the Circuit Court in discharging the prisoner.

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The precise question here presented was adjudged by this Court, at its December Term, 1893, in the case of *Garrett v. State*, in which it was held that the pardoning power of the Governor does extend to cases of contempt. A similar ruling had been made by our predecessors in the case of *Dennis McCarthy v. State*. Article III., Sec. 1, of the Constitution provides that "The supreme executive power of the State shall be vested in a Governor." Section 6 provides, viz.: "He shall have power to grant reprieves and pardons, after conviction, except in cases of impeachment."

It will be observed that the only exception to the power conferred upon the Governor to grant reprieves and pardons is in cases of impeachment, and the only limitation imposed is that the power cannot be exercised until after conviction. A judgment imposing a fine and imprisonment for contempt is a conviction, within the meaning of the Constitution. *Sinnott v. State*, 11 Lea, 281; *Harwell v. State*, 10 Lea, 544; *New Orleans v. Steamship Co.*, 20 Wall., 387-392; *Fisher v. Hayes*, 6 Fed. Rep., 64; 3 Am. & Eng. Enc. L., 796. Contempts of Court are public offenses, and pardonable as such. 1 Bishop on Crim. Law, 913, Subsec. 2; 1 McClain's Crim. Law, 9; *Ex parte Hickey*, 4 Smed. & M., 751; *State v. Saurennett*, 13 Am. Rep., 115 (S. C., 24 La. Ann., 119); *In re Mullee*, 7 Blatch, 23; *Bates case*, 55 N. H., 325; *State v. Matthews*, 37 N. H.,

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450; *In re Sims*, 54 Kan., 1; *In re Manning*, 44 Fed. Rep., 275.

In the case of *State v. Saurennett*, 24 La. Ann., 119 (S. C., 13 Am. Rep., 115), Judge Taliaferro said: "There being no exception found in our State Constitution precluding in such cases the exercise of the pardoning power by the Governor of the State, we feel no hesitancy in recognizing its existence. That the offense arising from contempt of the authority of a court is one which, from its nature, should be summarily punished to the end that an efficient and wholesome exercise of judicial power may be had, no one will question. A contempt of Court is an offense against the State and not against the judge personally. In such a case the State is the offended party and it belongs to the State, acting through another department of its government, to pardon or not to pardon, at its discretion, the offender."

Again, in *Ex parte Hickey*, 4 S. & M. Rep. (Miss.), the Court said, viz.: "The whole doctrine of contempt goes to the point that the offense is a wrong to the public, not to the person of the functionary to whom it is offered, considered merely as an individual. It follows, then, that contempts of Court are either crimes or misdemeanors in proportion to the aggravation of the offense, and as such are included within the pardoning power of the State," and the prisoner was discharged.

It appeared in that case that Hickey had been

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sentenced to fine and imprisonment for contempt of the Circuit Court at Vicksburg, and was pardoned by Governor Albert Gallatin Brown. The prisoner was released upon *habeas corpus*, the Court sustaining the right of the Governor to exercise the pardoning power in such a case.

In re Mullee, 7 Blatch., 23 S. C.; 17 Fed. Cas., 969, Judge Blatchford, district judge, said, viz.: "On motion for an attachment against the applicant as a defendant in a suit in equity in this Court, he was adjudged to have been guilty of a contempt of this Court by violating an injunction issued by this Court, and, on June 27, 1868, a fine of \$2,500 was imposed on him as a punishment for such contempt, and it was ordered that he should stand committed until the fine should be paid. After having been imprisoned for some time under such sentence, he presented a petition to this Court, praying for his discharge on the ground that he was unable to pay the fine. The decision of the Court thereon was that it had no jurisdiction or power to grant the prayer of the petition, and that relief must be sought by an application to the President of the United States. I then said: 'By the Constitution (Art. 2, Sec. 2, Subsec. 1) the President is invested with power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.' No such power is conferred upon any other officer or upon any Court. A contempt of Court is an offense against the

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United States. In the present case there is a judgment judicially declaring the contempt and offense. In the case of one Dixon a fine was imposed upon him by the Circuit Court of the United States for the District of Mississippi for a contempt of Court. He applied to the President for a pardon. The Attorney-general, Mr. Gilpin (3 Op. Attys-Gen., 622), decided that the pardoning power extended to such a case, and that the contempt was an offense within the language of the provision of the Constitution. I fully concur in this view, and it necessarily follows that if the power of relieving from the sentence imposed on Mullee falls within the pardoning power of the President, it is exclusive in the President, and cannot be exercised by this Court.”

The inquiry made of the Attorney-general in the case of Dixon was whether the executive authority to pardon properly extended to that case. In his opinion, given to the Secretary of State, in February, 1841, the Attorney-general says: “If we adopt, as the Supreme Court of the United States has decided we should do, the principles established by the common law respecting the operation of a pardon, there can be no doubt it may embrace such a case. A pardon has been held to extend to a contempt committed in Westminster Hall, under circumstances not materially different from those which occurred in the case submitted to the President. I am therefore of opinion that, should the President consider the facts such as to justify the exercise of his con-

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stitutional power to grant reprieves and pardons for offenses against the United States, there is nothing in the character of this offense which withdraws it from the general authority.”

After a careful review of the authorities, we are thoroughly satisfied with the former rulings of this Court on this subject, and the judgment of the Circuit Court is therefore affirmed.

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NATIONAL FERTILIZER CO. v. TRAVIS.

(*Nashville.* January 14, 1899.)

1. NEW TRIAL. *Setting aside third verdict.*

The Court is not precluded from setting aside a third verdict where there was error in the Court's charge on the second and third trials. (*Post*, pp. 18, 21, 22.)

2. MASTER AND SERVANT. *Servant sustaining dual relation to his fellows.*

A servant may sustain toward his fellows the dual relation or character of vice principal as to some duties and of fellow-servant as to others. And, in an action claiming damages for injury resulting from the act of such servant to his fellow or inferior servant, it is error for the Court to omit, especially if requested by a party, to charge fully and accurately as to the distinction, as regards the master's liability, between the official negligence of a vice principal and the individual negligence of a mere fellow servant. (*Post*, pp. 19-21.)

Cases cited and approved: *Gann v. Railroad*, 101 Tenn., 380; *Knox v. Railroad*, 101 Tenn., 375; *Electric R. Co. v. Lawson*, 101 Tenn., 406.

3. SAME. *Fellow-servants.*

An engineer is the fellow-servant of one who adjusts the belts when machinery is set in motion, when both act under prescribed rules, and especially where the latter controls the action of the engineer. The fact that the engineer may, in other matters, occupy the position of a vice principal does not affect the question. (*Post*, pp. 19-21.)

Case cited and approved: 80 Ind., 526.

4. SAME. *Same.*

The facts being stated, the question of whether a person is a fellow-servant or a superior is one of law for the Court. Hence, if upon plaintiff's theory and contention he was no more than

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a fellow-servant, the Court should so instruct the jury and submit the case upon the other issues. (*Post*, pp. 21, 22.)

5. SAME. *Same.*

The Court finds upon the evidence that the engineer was, in operating the engine, a fellow-servant of another employe who adjusted the belts, but that he was vice principal to the same employe as regards the safety and repair of the signal appliance intended for the latter's protection. (*Post*, p. 22.)

6. SAME. *Master's liability for injury caused servant defined.*

To render a company liable for injury inflicted upon an employe by a fellow-servant, there must be shown (1) general incompetency of the fellow-servant; (2) knowledge of such incompetency by the master and want of such knowledge in equal degree by the complaining servant; (3) some specific negligent act by the incompetent servant proximately causing the injury. (*Post*, p. 24.)

7. SAME. *Inexperience not proof of incompetency, when.*

Mere inexperience in the performance of duties requiring no great amount of intelligence or skill is not, necessarily, evidence of incompetency. (*Post*, pp. 24, 25.)

FROM DAVIDSON.

Appeal in error from Second Circuit Court of Davidson County. JNO. W. CHILDRESS, J.

E. H. EAST and J. S. PILCHER for National Fertilizer Co.

LELLYETT & BARR and STEGER, WASHINGTON & JACKSON for Travis.

WILKES, J. This is an action for damages for the negligent killing of John Loomis, an employe

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of the defendant company. The deceased, at the time of the killing, was engaged in putting belts upon three pulleys and was killed in consequence of his clothing being caught upon the pulley shaft and wound around it in such manner as to bind him to it and cause him to revolve with it, thus mangling him and dashing him to pieces. There were three trials before the Court and jury, in two of which there was a verdict for the plaintiff, which were set aside by the trial Judge because not sustained by the weight of the evidence. Upon the third trial there was a verdict for \$6,000, and the trial Judge, on motion for new trial, refused to set it aside, though dissatisfied with the evidence, believing that he had no power to set aside the third verdict. Accordingly judgment was rendered and the defendant company has appealed and assigned quite a number of errors.

The recovery is insisted upon on the ground that the engineer was incompetent to operate the engine and run the machinery; that he started the engine at full speed without giving timely warning, and without receiving a signal from the deceased that he might safely increase the speed; and that the signaling appliances were defective and out of order.

While there are a great number of errors assigned, the defense generally stated is that the deceased was guilty of contributory negligence in wearing an overcoat, which made the work about the

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machinery hazardous, and this, it is contended, was the proximate cause of the injury; that there was no evidence of general incompetency of the engineer, and none whatever of any specific negligence at the time of the killing which caused or proximately contributed to it, and it is insisted on the whole case that there is no evidence to support the verdict.

Much discussion is had in the case upon the subject of superior and fellow-servants. Plaintiff insists that Fain, the engineer in charge of the machinery, was the superior of Loomis, and that the latter was so far under his control as to be an inferior servant, with Fain not only as his superior but occupying the relation of vice principal as to him. We are of opinion the Court did not fully charge the law applicable to the facts of this case upon this subject of superior, inferior, and fellow-servants.

There is evidence to show that Fain was foreman, and as such had control and supervision over Loomis; that he employed and discharged the hands generally, and usually directed them in their work, and there is evidence that Loomis was directed by Fain to do the particular work in which he was engaged when he was injured. But there is evidence also showing that Fain was filling several positions at the same time—that is, he was shipping clerk, foreman, and engineer. The law is well settled that an employe may occupy the place of the principal as to some duties, and as to others be simply a fellow-

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servant. For his official negligence as vice principal, his principal would be responsible; for his individual acts of negligence as fellow-servant, the principal would not be liable. This question has been recently before this Court and maturely considered in the case of *Gann v. Railroad*, 17 Pickle, 380, and the rule is there attempted to be fully stated and the authorities bearing on the subject. See, also, *Knox v. Railroad*, 17 Pickle, 375, and *Chattanooga Electric Ry. Co. v. Larson*, 17 Pickle, 406. In the case at bar it is evident that if the deceased was killed by the negligence of Fain, while in discharge of his duties as engineer in operating the engine, it was important that the relation of Fain, as such engineer, to Loomis be fully and correctly stated, and special instruction was asked upon this point, but was not given by the Court in the explicit terms asked, and which were demanded by the facts of the case.

It is evident that Fain, in this case, if negligent at all, was negligent in operating the engine and in either failing to give or to wait for the proper signals prescribed by the rules of the company. Now, in the running of the engine he was not in any way the superior, but was the fellow-servant, of Loomis. According to plaintiff's theory, that Fain was to start up the engine only upon notice from Loomis, it is evident that he was under the direction, as to that matter, of Loomis, and Loomis was not under his direction. Upon defend-

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ant's theory, then, Loomis and Fain were both operating under rules of the company. Fain was still under Loomis' control, for Loomis could signal him to stop or run slow, and it was the duty of Fain, as engineer, to obey Loomis' direction, and they were fellow-servants.

In the case of *Boyce v. Fitzpatrick*, 80 Ind., 526, it appeared that the plaintiff was injured while employed under the direction of the superintendent and manager, who was, at the same time, in charge of the machinery in the defendant's factory, through the negligence of the superintendent, and it was held that he was the fellow-servant of the employe, and not a superior or vice principal. See, also, *Bailey's Personal Injuries*, Secs. 1963, 2064.

We are of opinion that, the facts being stated, the question of whether a person is a fellow-servant or a superior is one of law for the Court, and that, upon the facts as contended for by the plaintiff in this case, Fain, in running the engine, was the fellow-servant of Loomis while the latter was engaged in adjusting the machinery or belts, and the Court should have so charged, and then rested the case before the jury upon the other contentions made by the plaintiff; that Fain, though a fellow-servant, was wholly incompetent, and known to be so for the work and place of an engineer, and that the appliances for signaling were defective. How far this error was instrumental in causing the verdict as rendered we cannot tell. There being error

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in the charge on both the second and third trials, the rule of the conclusiveness of two verdicts does not apply.

Plaintiff does not, however, rest his right to recover upon the fact that Fain was the superior and Loomis an inferior under him, but he insists that the whistle appliance through the building, for giving notice by the engineer or to him, was not in proper condition, but was defective. Under the facts as developed by this record, it was clearly the duty of Fain, as foreman, to see that this appliance for giving notice was in proper condition and not defective, and as to this feature of the case he was the superior and vice principal of Loomis, although he was his fellow-servant in the work of running the engine. Upon this branch of the case there is no definite reliable evidence that the whistling appliance was defective, and none whatever that Fain knew of any defect in it or had any ground to suspect any.

It appears that if there was any defect in the appliance, it was not in its being defective in construction, but the most that a witness (not remarkable for intelligence) could say was that he supposes some water must have been left in it over night, which prevented its sounding promptly. It does not appear that Loomis attempted to sound the whistle and was unable to do so, and the witness, James Carter, states that when he pulled the cord the first time, if the whistle sounded he did not hear it;

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but he was excited and cannot say he pulled it properly, but that when he pulled it the second time it did sound and was heard by him. We are unable to find in the record any reliable evidence that this appliance was out of order or defective, and no evidence whatever, if there was any defect in it, that it was known to Fain, the foreman, or could have been known to him in the exercise of proper diligence by him. We are of opinion, under the proof, that it was incumbent on Fain, as foreman, to have this appliance safe, and, if he knowingly failed, the company would be responsible; for, while in running the engine he was a fellow-servant, in furnishing the appliance he stood in the place of the master, and the master was responsible for his acts. This distinction is fully pointed out in the Gann case.

But plaintiff insists that if this all be true, still the defendant is liable because Fain was totally incompetent to run the engine in such manner as to insure the safety of the employes about the building.

Much is said about Fain's not observing the rules as to signals in starting the machinery. But this is important alone upon the question as to whether or not he was a competent engineer. If he was a skilled and competent engineer, the fact that he failed to observe the rules would be only evidence of his individual negligence in the discharge of his duty as a fellow-servant for which the principal would not be liable. If Fain was incompetent to operate the

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engine and this fact was known to the company and not known to the deceased, and if they continued him in such service and he was on this occasion guilty of negligence which proximately caused the death, then the company would be liable.

These things, however, must concur: general incompetency of the engineer, knowledge by the company of such incompetency and want of such knowledge by Loomis, and some specific act of negligence on Fain's part which proximately caused the injury and death. No matter if he was incompetent and it was known to the company, still if there was no act of negligence which proximately caused this particular injury, the company cannot be held liable therefor. There is evidence that Fain was a young man who had left school and had entered into the service of the company first as shipping clerk, then as foreman, and then as engineer, and he was probably filling all these places when the injury occurred. There is no imputation against his general intelligence, but only against his experience as an engineer. Upon this feature of the case it does not appear that it requires any great amount of intelligence or skill to operate an engine as he was required to do. It does appear that the young man had been running the engine for some nine months. When he was first put in charge of it, it is shown that he was not entirely familiar with it, and some evidence of his want of information appears in the record, but this all related to a period of service

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prior to the time of this accident, and it is at best quite indefinite in its character. Inexperience is not conclusive and can hardly be held to be even persuasive of incompetency. The most thoroughly competent machinists and experts were at one time inexperienced, but this frequently leads to greater care than is exercised by the party who has become careless through continual service about the work.

It appears that the deceased had been a long time in the employ of the company and was thoroughly familiar with all its departments and the details of the work, and must have well known the capacity of Fain as engineer. On this particular occasion it was his duty, or he was directed to place the belts upon these different pulleys which were to operate different parts of the machinery. These pulleys were all upon the same shaft and only a few feet apart. The belts could only be put on while the machinery was in motion, and it was important that the motion should be slow, as rapid motion would tend to catch the person or his clothing and draw him on to the moving machinery. It was a matter which required caution and care to be safely done.

No one saw how the accident occurred. When first discovered, soon after the engine was started, the deceased was fastened to the shaft by his clothing, which was fairly wrapped around it, and he was being rapidly revolved with the shaft around and around, his body closely pinioned to it by his

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clothing and his legs and feet loose and striking the floor with each revolution until they were broken and dismembered. He had, it appears, succeeded in putting on two of the three belts, but had not put on the third one. He had made no signal to stop the machinery or to continue to run it slowly. There are two theories as to the manner of making the signals. Plaintiff insists that when belting was to be done it was the duty of the engineer not to start the machinery into rapid motion until the signal was given that the belting was on. The defendant's theory is that the machinery was started slowly, and if, after five minutes, no signal to stop or continue slowly was given, then the machinery was to be put in rapid motion.

There is evidence to support both theories; but grant that the one advanced by the plaintiff is correct, and that Fain should not have started the engine until he received a signal from Loomis, and that he should have waited for the signal and failed to do so, this would at least be but the negligent act of a fellow-servant and if that fellow-servant were not shown to be incompetent generally there would be no ground of recovery. It is impossible, from the record, to determine how the accident occurred. It is evident that the deceased had on his overcoat on the morning of the accident and had been previously warned not to wear it about the machinery. There is evidence that after this warning he had cut off the tail, or a part of it, and

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some evidence that he had cut it twice and that it was no more than a jacket or roundabout at the time of the accident, but it is also evident that the shaft did catch the clothing, and, while all his clothes were wrapped around it, it appears that the coat contributed largely to bind him to the shaft. It is argued that the shirt and underclothing was found next to the shaft and the coat on the outside, and that this demonstrates that he was not caught by the coat; but it is not shown how the shaft, which was a smooth rod of iron, could have caught the shirt and underclothing without first having caught the coat, nor how either could have caught unless the deceased, by accident or incautiously, had placed himself against it or leaned upon it. In this connection it is strongly urged that the deceased had properly put on two of the belts and was then injured either while putting on the third one or by incautiously exposing himself and being caught by his clothing. It is argued that this is conclusive that the machinery was being properly run and slowly when the first two belts were adjusted, and that if the machinery was running rapidly when the third belt was adjusted it was negligence on the part of deceased to attempt to adjust it, and evidence is introduced to show that the momentum of the machinery could not be suddenly obtained, but would require from a half to a minute to become effective, so that deceased must have been negligent in attempting to put on the third belt

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after the momentum had been acquired. This, with the kind of coat worn, was a matter to be considered by the jury upon the question of contributory negligence.

It is incumbent on the plaintiff to show that the accident was caused by some negligent act of the defendant, which proximately caused it, and that this negligence was not the act of a competent fellow-servant, but of the master or some one in his place, or an incompetent servant. We are not satisfied, from the record, that this has been shown, and it may be that the jury were misled into the belief that Fain, while acting as engineer, was the superior of Loomis and gave undue weight to the fact, and held the company responsible for his negligence, if there was any. For these reasons we are constrained to reverse the judgment and remand the cause for another trial. • The appellee will pay cost of appeal.

P'Pool v. Bank and Trust Co.

P'POOL v. BANK AND TRUST CO.

(*Nashville.* January 18, 1899.)

POWER OF ATTORNEY. *Revocation of.*

A power of attorney authorizing a trustee to sell lands, make deeds to the purchasers, and collect and distribute proceeds after retaining commissions, cannot be revoked by the makers, after a sale has been made, so as to prevent the execution of deed and perfecting of the purchaser's title, especially where the power of attorney purports, on its face, to be irrevocable, and some of its makers approve the sale and desire its consummation.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
H. H. Cook, Ch.

LYTTON TAYLOR for P'Pool.

J. S. PILCHER for Bank & Trust Co.

WILKES, J. This is a bill to recover a lot in the city of Nashville, sold by the Union Bank & Trust Company, as trustee, to the defendant, William Litterer, under authority given by the complainants and others to that company.

Complainants are the heirs at law and devisees of E. F. P'Pool, who died at Nashville, in May, 1880, after having made his last will and testament.

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In this will he devised his property, real and personal, to his wife, Sarah G. P'Pool, for life, with remainder to his eleven children, to be equally divided between them. The widow died in June, 1895, leaving the eleven children surviving. All of these children, including the husbands of the daughters who had married, entered into a written agreement reciting the devises and describing the property, and stating the death of the father and mother, and that no debts existed against the estate, and that they were desirous of avoiding delay, annoyance, inconvenience, and expense in selling the property and winding up the estate.

The instrument then conveys to the defendant trust company certain real estate in trust for the benefit of the grantees, and directs its sale by the trustee on such terms and conditions as will, in its best judgment, promote the interests of the grantees. The terms of sale were fixed with discretion in the trust company as to credit installments, one-third, however, to be in cash. It was further recited in the instrument that to make sure that the execution of the trust should in no manner be interfered with, embarrassed, or impeded by death or transfer of any interest, the trust should be irrevocable and carried out. The trust company was given power to execute deeds with general warranty, and to collect the proceeds of sale, reserve a commission, and distribute the balance among the grantors.

The trust was accepted by the trust company,

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and has been executed by selling all the property and by accounting for the proceeds, except in the case of one lot now in controversy. This lot was advertised for sale, and was sold at public sale by the trustee, September 28, 1897, and was bought by Wm. Litterer for \$1,550 cash. Up to this time there had been no dissent by the grantors, and no dissatisfaction on their part to anything done by the trustee in execution of the trust.

On October 9, 1897, three of the eleven devisees filed with the trustee a paper attempting to withdraw the power of sale, and notified the trust company not to proceed further with the sale to Litterer. A like notice was given prior to October 17 by another one of the devisees, and soon after two others gave the same notice. Two other grantors claim to have given like notices, which, however, were not received by the trust company.

On November 17, 1897, the trust company conveyed the lot to Wm. Litterer in pursuance of the sale previously made. At the time he purchased, Mr. Litterer knew of no dissent to the sale, and one of the beneficiaries was present. He was informed, however, of the dissent by the trust company before it made the deed, and that the dissenters represented four-elevenths of the property.

The present bill is filed by eight of the eleven interests. The other interests approve the sale and desire its confirmation.

There is no allegation of bad faith or misconduct

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on the part of the trustee, but it is claimed the parties have the right to revoke the power before it is completely executed. The Court of Chancery Appeals report the value of the property as \$1,500 or \$2,000, but say there is much variance of opinion on this point.

We are of opinion the parties dissenting had no power to defeat this sale and conveyance. The instrument was intended to be irrevocable, and it was so expressly stated on its face. This provision was intended to provide for such a contingency as this, and to give power to the trust company, in good faith, to make a sale, even though some interests were not satisfied. The sale was negotiated before any dissent was made. It was done in good faith. It was mutually binding on all—the trustee, the beneficiaries, the purchaser. Each had an interest in its execution. The purchaser had acquired rights which he could enforce. The making of the deed was a duty which the trustee was under to consummate the sale already made and executed. If the dissent had been filed before the sale was negotiated, it may be that it would have had the effect to prevent it, but that having been done in good faith, the dissent could not prevent the making of the deed to carry it into effect.

We think there is no error in the decree of the Court of Chancery Appeals, and it is affirmed.

Foster v. State.

FOSTER v. STATE.

(Nashville. January 28, 1899.)

1. VERDICT. *Of murder in second degree not sustained by the facts.*

The Court finds, upon the facts set out in the opinion, that a verdict for murder in the second degree is not sustained against a son for fatally shooting his father's assailant. (*Post*, pp. 34-36.)

2. EVIDENCE. *Of facts attending previous difficulty admissible in homicide cases.*

On the trial of a son for killing his father's assailant, it is competent to prove, on behalf of the defendant, not only that defendant had seen a previous difficulty between his father and the deceased, but also the particular facts of the transaction—especially the menacing language and conduct of the deceased toward the father on the occasion. (*Post*, pp. 36-38.)

3. SELF DEFENSE. *Son's right to defend his father.*

If a son honestly believes, on reasonable grounds, that his father, who is himself fighting in self-defense, is in danger of death or great bodily harm, from an assault being made upon him by an antagonist of superior strength, it is his legal right, as well as his filial duty, to interfere and prevent the killing or maiming of his father, and he is, in such case, justified in the use of such means as are necessary, under all the circumstances, to effect this end. (*Post*, p. 38.)

4. SAME. *Evidence.*

And, in such case, previous acts of hostility, and demonstrations, if any, made by the deceased toward the father, and coming to the knowledge of the son, are competent as tending to show whether the son had reasonable grounds to believe that the deceased was making a deadly assault upon the father. (*Post*, p. 38.)

FROM GILES.

Appeal in error from Circuit Court of Giles County. E. D. PATTERSON, J.

Foster v. State.

J. T. ALLEN and F. RIVERS for Foster.

Attorney-general PICKLE and J. L. COFFMAN for State.

WILKES, J. A. T. and Morgan Foster are father and son. The father is a man of about fifty-nine years of age; the son is a boy of sixteen. They were indicted for the killing of R. W. Woodard. The father was acquitted. The son was convicted of murder in the second degree and sentenced to ten years in the State penitentiary, and has appealed.

The deceased, Woodard, was a vigorous man about thirty-five years old, and estimated to weigh from 150 to 180 pounds. Both Woodard and the elder Foster were wagoners and log haulers. There had not been good feeling between them for some time. It appears that they, while driving their wagons and teams in opposite directions, met in the public road, when they, instead of passing, blocked each other in the way. Some words ensued. Both parties left their wagons and went back towards Marbuts, a post-office on the road near by. In passing down the road the deceased came up to a lot of boys, white and black, who were having some music and dancing in the road. It was Christmas times, December 27, 1897. Among these boys, and taking part in the frolic, was Morgan Foster. Deceased, on approaching the boys, pointed to the elder Foster, who was coming on behind him, and said, "Boys,

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if you want to see a grand rascal, look up the road," pointing toward the elder Foster. The son heard the remark, and demanded to know of deceased what it was he said, to which the deceased replied: "You are a minor, and I'll have nothing to do with you," and passed on.

The son, it appears, caught the purport of what the deceased had said but not the language. The son then started towards his father's wagon to help get it by the deceased when his father intercepted him and told him to let the team alone. In the meantime the deceased was returning along the road and met the elder Foster still on his way to Marbut's. He accosted Foster and said: "Did you call me a son of a b—h at the wagon?" to which the elder Foster replied, "I did."

Woodard then assaulted the father and had him to his knees and was choking or attempting to choke him, and was striking him over the head, whether with a knife or with his fists the son says he could not tell. The son ran up and demanded of Woodard that he desist and told him twice to hold up. Woodard persisted in the assault. It is shown that he was physically able to handle both of the Fosters. The elder Foster was not robust and was besides a cripple. The son, after calling to Woodard once, and according to some of the witnesses twice, drew a pistol and fired at deceased and shot him, the ball entering the eye and killing him. The boy then went up the road a short distance to his

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father's home, at the suggestion of his father, and was soon afterward followed by two Deputy Sheriffs. When they entered the premises the boy ran out the back way and tried to make his escape to some bushes near by, when one of the officers shot him in the neck and head, putting out his right eye.

The deceased had the character of being somewhat quarrelsome and had had several fights. Upon this point, however, there is a conflict of testimony. The father testified that he was entirely powerless in the struggle with the deceased and believed he was in danger of losing his life; that he did not strike deceased, because the fierce assault gave him no opportunity; that he did not see his son or know that he was taking any part in the struggle until he heard the pistol shot and felt the deceased relax his hold upon him. The boy testified that he honestly believed his father was in danger of being killed or of receiving great bodily harm and shot in his defense, believing it to be necessary to save his father's life. The elder Foster was, upon these facts, acquitted of any offense. It is evident that if the son was guilty of any offense it was not of murder in the second degree, but of a much less offense, and the cause must be reversed and remanded for a new trial.

It appears that some time before this difficulty there had been another difficulty between the deceased and the elder Foster at Marbut's store. Deceased was at the store when Foster came up. The

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latter was on horseback. He had been for some time going on crutches in consequence of a broken limb, but did not have his crutches with him on this occasion. The deceased and Foster had some words in regard to an account and settlement between them in which the deceased characterized several items in Foster's account as lies. There was testimony offered tending to show that the deceased started to attack Foster and attempted to drag him from his horse, but was prevented from doing so by the bystanders. He made threats against him and said he and Foster could not live in the same county, and he would get his gun and kill him. The son was off a short distance, and, from the affidavits on application for new trial, it appears saw the difficulty, but took no part in it. The trial Judge declined to allow witnesses to prove the actions and demonstrations of the deceased toward Foster at this time, but permitted them alone to prove that Foster and deceased had a difficulty on the occasion. This, we think, is manifest error. Every circumstance that tended to throw light upon the state of mind and apprehension the defendant was under when he went to his father's relief was not only competent but vital to the crucial question in the case, and that is whether the son was justified in believing it was necessary to interfere in order to save his father's life. The acquittal of the father raises a conclusive presumption that he was guilty of no wrong in this difficulty with deceased.

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This being so, if the son really believed, on reasonable grounds, that a deadly assault was being made upon his father, and that owing to the superior power of his antagonist he would be killed or receive great bodily harm as the result of the assault, it was his legal right, as well as his filial duty, to interfere and prevent the killing or maiming of his father, and to use such means as were necessary, under all the circumstances, to effect this purpose.

Previous acts of hostility and demonstrations, if any, made by the deceased toward the father, and coming to the knowledge of the son, and his conduct and demeanor toward him, were important as showing whether the boy had reasonable grounds to believe the deceased was making a deadly assault upon his father, and would kill him or do him great bodily harm unless by some summary means he was prevented. It was error to reject the testimony as to who was the aggressor in this previous difficulty, and what demonstrations were made on that occasion by deceased, especially if they were seen or came to defendant's knowledge.

We do not mean to in any way justify or excuse the defendant for going armed contrary to law. It was an offense to have a pistol upon this occasion, as he did, and for that he might have been punished. But the offense of going armed is one entirely different from a crime committed by using the pistol in an assault upon another, and it is only for

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this latter offense the defendant is on trial before us. The carrying of the pistol is important in this case only as bearing upon the question of malice, but the record fully shows that defendant was not wearing it with any expectation of using it in committing any assault, and none that he was wearing it with the purpose of using it on the deceased. It was a boyish indiscretion of which, unfortunately, too many young men are guilty.

The judgment is reversed, and cause remanded for new trial.

The Precious Blood Society v. Elsythe.

THE PRECIOUS BLOOD SOCIETY v. ELSYTHE.

(*Nashville.* February 4, 1899.)

1. RESCISSION. *Of deed for fraud.*

Rescission of a deed for fraud will not be decreed unless the complaining party disaffirmed the deed promptly on discovery of the fraud and ever thereafter consistently adhered to that line of action. (*Post*, pp. 43, 44.)

Cases cited and approved: *Knuckolls v. Lea*, 10 Hum., 576; *Ruohs, v. Bank*, 94 Tenn., 73; *Woodfolk v. Marley*, 98 Tenn., 467.

2. SAME. *Same. Example.*

Hence, a vendee's claim to rescission for fraud will be denied, where, after acquiring full knowledge of all the facts constituting the fraud, he elected to retain the premises and lease them to a third party for a term of three years, making the claim to rescission for the first time in defense of a suit for the purchase price. (*Post*, pp. 41-43.)

3. CORPORATIONS. *Misnomer in deed.*

Misnomer of corporation as vendor in a deed—*e. g.*, "Precious Blood Society" for the true name, "Female Society of the Precious Blood"—does not avoid the deed, if the identity of the corporation is unmistakable, either from the face of the instrument or from averment and proof. (*Post*, pp. 44-46.)

Cases cited and approved: 10 N. J. Law, 323; 13 Johns., 38; 5 Ark., 234; 19 Ala., 659.

4. SAME. *Objection of misnomer not available.*

The objection of misnomer made by the defendant in a suit brought by the corporation to enforce a vendor's lien, is unavailing when interposed for the first time in the Court of Chancery Appeals, and it appears unmistakably what corporation was intended and that the name objected to was the one used in the deed and notes and in the pleadings of both parties. (*Post*, pp. 44-46.)

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5. **SAME.** *Deed of, valid without corporate seal.*

The deed of a corporation organized for purely charitable purposes is valid without the affixing thereto of a corporate seal, especially when it does not appear that the corporation has a seal. (*Post*, p. 46.)

6. **SAME.** *Same.*

The deed of a corporation is sufficient, without affixing its corporate seal, to pass an equitable but not a legal estate. (*Post*, p. 46.)

Cases cited and approved: *Garrett v. Belmont Land Co.*, 94 Tenn., 460; *Brinkly v. Bethel*, 9 Heis., 786.

FROM LAWRENCE.

Appeal from Chancery Court of Lawrence County.
W. L. GRIGSBY, J. sitting by interchange.

H. B. SOWELL and G. T. HUGHES for Society.

J. D. BUNCH, J. B. BOND, and W. A. STEWART
for Elsythe.

BEARD, J. On November 10, 1893, the complainant executed and delivered to the defendants, Elsythe and Verge, a deed, with clauses of general warranty, by which there was conveyed about 791 acres of land lying in Lawrence County, with all the improvements thereon, for the recited consideration of \$8,500. Of this consideration, \$2,000 was paid in cash on different days prior to the execution of the deed, and the remainder was evidenced by five notes executed by the grantees, maturing on

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November 15, 1894, 1895, 1896, 1897, and 1898, respectively, to secure the payment of which a lien was retained in the face of the deed. Immediately on receiving this deed the grantees went into possession, and remained upon the property during the year 1894. Their efforts at farming the place disclosed to them that they had been grossly imposed upon by their vendor and its agents, but instead of abandoning the contract and notifying complainant of their purpose to repudiate it, they entered into an agreement with a third party by which they leased to him the property for a term of three years, and placed their lessee in possession.

Pending this lease, and on August 23, 1895, the present bill was filed by the vendor to enforce the lien reserved in the deed, one of the purchase money notes being then overdue and unpaid.

Some time thereafter Elsythe and Verge filed an answer and cross bill, in which they set out, with much detail, the fraudulent representations as to the character and capabilities of this land for farming and other purposes made by the officers and agents of this complainant corporation, and aver that ignorant and unskilled as they were, and secluded from those who would have put them on guard as to the falsity of these representations and the real worthlessness of this property, they became easy victims of the machinations of complainant and its agents. In their cross bill they ask to be relieved from obligation to pay their outstanding notes, and that

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they have a decree against their vendor for the money already paid by them, to be charged as a lien on the land.

In due time these averments were met by a positive denial on the part of the Precious Blood Society.

The Chancellor, on the hearing, granted complainant the relief sought in the original bill, and dismissed the cross bill. On appeal the Court of Chancery Appeals find that the cross complainants were the victims of grossly fraudulent statements and representations made by the officers and agents of the complainant. They also find that after the discovery of the fraud the cross complainants made the three-year lease of the property already referred to, but they held that this act was not sufficient to debar them from relief in a Court of equity. They therefore reverse the Chancellor, dismiss the original bill, and grant cross complainants the full relief prayed in the cross bill.

Can this decree be maintained? There is no doubt a Court of equitable jurisdiction would have been quick to grant these parties relief against the fraud thus perpetrated upon them, if they had been diligent in asking its aid, after the discovery of the fraud. But are they entitled to such relief upon this record?

Promptitude in disaffirmance, after the discovery of the fraud, has been uniformly held essential to the maintenance of a claim for rescission. Not only

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promptitude is required, but, once having disaffirmed, the victim of the fraud must adhere to that line of action. Vacillation will be fatal to his claim. He will not be permitted to affirm to-day and disaffirm to-morrow. If he does any material act, "with full knowledge of the facts constituting the fraud . . . which assumes that the transaction is valid," it will be taken as a ratification conclusive upon him. 2 Pomeroy, Sec. 916.

These rules for the guidance of Courts of equity are to be gathered from text-books as well as the opinions of other Courts, but they are nowhere more distinctly announced than in the cases of *Knuckells v. Lea*, 10 Hum., 576; *Ruohs v. Bank*, 10 Pick., 73, and *Woodfolk v. Marley*, 14 Pick., 467. Under these rules we think the cross complainants were in no condition to ask for a rescission of the contract on the ground of fraud.

But the Court of Chancery Appeals base their decree for rescission not only on the ground of fraud, but on certain defects in the deed from complainant to Elsythe & Verge, which they held made it void. These defects were that the articles of incorporation disclosed that complainant's corporate name was the "Female Society of the Precious Blood," and not that actually used in this deed, the "Precious Blood Society;" and again, that the corporate seal was not affixed to the deed.

These objections were made for the first time in that Court. No point was made on these defects

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in the answer, and no relief was predicated on them in the cross bill. In this latter pleading, it is true, is found the general averment "that the title to this land is not good," an averment hardly sufficient to cover these defects, unless it be that they were sufficient to make this grant void. This, we think, they did not do.

The record shows that this corporation conducted its business under the name and style of the "Precious Blood Society," it used that as its corporate name in the deed which it executed to Elsythe & Verge, and it accepted from them the purchase money notes payable to it in the same name. By this name it seeks to enforce, as against these parties, its lien on the land sold to them, and the cross complainants call upon it to answer and ask relief against it by the same name.

Under these conditions it is too late, even if the right ever existed, and by the averment just quoted they intended to assert it, for the cross complainants to call in question this deed for misnomer.

But without regard to time and character of pleading, on this record, they cannot do so. The record leaves no doubt that the grantor in this deed is the corporation created by the articles of incorporation. Its identity is put beyond question. This being so, the general concurrence of modern authority is to the effect that a misnomer or variation from the precise name of a corporation, in a grant or obligation by it or to it, is not material, if th

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identity of the corporation is unmistakable either from the face of the instrument or from proof and averments. 1 Thomp. on Corp., Sec. 294; Angell & Ames on Corp., Sec. 99; *Rex v. Houghley*, 4 B. & Ad., 655; 1 Dill. on Mun. Corp., Sec. 179; *Inhabitants v. Strong*, 10 N. J. Law, 323; *African Society v. Varick*, 13 Johns., 38; *Bowen v. State Bank*, 5 Ark., 234; *Douglas v. Branch Bank*, 19 Ala., 659.

Nor do we agree that the lack of the corporate seal worked an effect to destroy this deed. The record does not show that this corporation, organized for purely charitable purposes, had a seal; but even had it one, still the omission to affix it would only have affected the deed in so far as the legal title was concerned; it still would be sufficient to convey an equitable estate. *Garrett v. Belmont Land Co.*, 10 Pickle, 460; *Brinkley v. Bethel*, 9 Heis., 786.

The result is, the decree of the Court of Chancery Appeals is reversed. The cross bill of defendants is dismissed, and a decree will be entered on the original bill.

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WEAVER v. SMITH.

(Nashville. March 7, 1899.)

1. JUDGMENT LIEN. *Strictly construed.*

Judgment liens are the creatures of statute and strictly construed. They are lost if the statutory provisions are not strictly complied with. (*Post*, p. 61.)

Cases cited and approved: Chapron v. Cassady, 3 Hum., 660; Bridges v. Cooper, 98 Tenn., 394.

2. SAME. *Lost when.*

The judgment lien upon a debtor's equitable realty, created by registration of memorandum of judgment, to be followed by suit within sixty days thereafter, is lost unless the suit to enforce it is brought within thirty days after the return *nulla bona* of the original execution legally issued thereon. It will not suffice to bring such suit within thirty days after return of an alias execution *nulla bona*, if more than thirty days have elapsed after return of the original execution. (*Post*, pp. 60-63.)

Code construed: §§ 4712, 4713, 4732-34 (S.); §§ 3698, 3699, 3718-20 (M. & V.); §§ 2984, 2985, 3002-3004 (T. & S.)

Cases cited and approved: Riddle v. Motley, 1 Lea, 468.

3. SAME. *Execution properly issued. when.*

The Court always indulges the presumption that an execution was legally and regularly issued, when nothing appears to the contrary. (*Post*, p. 59.)

Cases cited and approved: Esselman v. Wells, 8 Hum., 487; Miller v. O'Bannon, 4 Lea, 401.

4. SAME. *Same.*

An execution is legally and regularly issued, so as to require proceedings against the debtor's equitable realty to be commenced

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within thirty days after its return *nulla bona*, where it was issued during the term at which the judgment was rendered but thirty days after its rendition. (*Post*, pp. 63, 64.)

Code construed: §§ 4732-34 (S.); §§ 3718-3720 (M. & V.); §§ 3002-3005b (T. & S.).

FROM WILLIAMSON.

Appeal from Chancery Court of Williamson County.
F. C. MAURY, Sp. Ch.

STOKES & STOKES and J. H. HENDERSON for
Weaver.

VAUGHAN & ANDERSON and JAMES C. BRADFORD
for Bank & Trust Co.

C. D. BERRY for Pritchett's Estate.

R. L. MORRIS for Masonic Widows and Orphans'
Home.

WILKES, J. These cases, as to the facts and law deemed applicable, are fully set out in the opinion of the Court of Chancery appeals, as follows:

"The contest in this case is between judgment creditors of Baxter Smith as to which has the prior liens upon an equitable interest in a tract of land, to reach which the four separate bills, as stated in the caption, are filed.

"Baxter Smith was the owner of a tract of land in Williamson County, upon which he had placed several mortgages. The land was worth more than the mortgage debts upon it, and the several com-

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plainants, who were judgment creditors, sought to reach his equitable interest in this land.

“There were three separate bills filed by the complainant, Weaver, Clerk and Master, and one bill filed by the Union Bank & Trust Company. These bills were all filed to collect unsatisfied judgments against Baxter Smith.

“The first bill filed by Weaver was on February 3, 1896, the second was on May 9, 1896, the third on June 18, 1896. The Union Bank & Trust Company's bill was filed May 7, 1896.

“A condensed and tabulated statement, showing accurately the dates of the filing of these bills, the dates of the judgments sought to be collected, the dates on which executions were issued, and the dates of their return, taken from the exhibit to the brief of counsel, and adopted as a part of our findings, is as follows:

“ ‘JUDGMENTS RECOVERED IN THIS CAUSE AND UPON
WHICH BILLS WERE FILED.

“ ‘The dates and amounts of the judgments, the dates executions issued, when returned, and dates bills were filed, are as follows:

“ ‘JUDGMENTS OF WEAVER, CLERK AND MASTER.

First Bill.

Date.	Amount.	Ex. Is.	Returned.
May 3, 1895	\$412 17	July 23, 1895	Aug. 2, 1895, <i>nulla bona.</i>
May 3, 1895	885 00	July 23, 1895	Sept. 27, 1895, <i>nulla bona.</i>
Oct. 25, 1895	117 80	Dec. 26, 1895	July 29, 1895, <i>nulla bona.</i>

“ ‘Weaver filed his bill on these judgments February 3, 1896.

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Second Bill.

Date.	Amount.	Ex. Is.	Returned.
Jan. 10, 1896	\$696 07	Feb. 25, 1896	Feb. 29, 1896. <i>nulla bona.</i>

“ ‘Registered in Williamson County March 10, 1896. Alias execution issued May 6, 1896; returned *nulla bona* May 8, 1896.

“ ‘Bill filed on this judgment May 9, 1896.

Third Bill.

Date.	Amount.	Ex. Is.	Returned.
Nov. 15, 1895	\$468 00	Jan. 6, 1896	Feb. 29, 1896, <i>nulla bona.</i>
Nov. 15, 1895	404 25	Jan. 6, 1896	Feb. 29, 1896, <i>nulla bona.</i>
Jan. 10, 1895	696 07	Jan. 25, 1896	Feb. 29, 1896, <i>nulla bona.</i>
Oct. 25, 1895	91 20	Dec. 26, 1895	Feb. 29, 1896, <i>nulla bona.</i>

“ ‘Bill filed on these judgments June 18, 1896.

“ ‘Union Bank & Trust Company's judgments, October 28, 1895, \$9,590.37; registered in Williamson County December 2, 1895; credited April 11, 1896.

“ ‘Bill filed to collect these judgments, May 7, 1896.’ ”

“ ‘A statement of facts agreed upon by the parties is also adopted as a part of our findings, and is as follows:

“ ‘In the above consolidated causes the following facts are agreed to:

“ ‘1. That Baxter Smith is the owner of a tract of land located in the fourth civil district of Williamson County, Tennessee, and that the boundaries of said land are correctly set out in the various bills in these consolidated causes.

“ ‘2. That Baxter Smith, on June 13, 1892, mortgaged said tract of land to C. D. Berry, as trustee, to secure certain notes owing to the estate of Sam. C. Pritchett, deceased, as follows: One note for \$4,000, due September 13, 1893; one note for \$163, due January 1, 1893, and one note for \$186.67,

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due September 13, 1893. That all of said notes are owing, past due, and that nothing has been paid upon them.

“‘3. That defendant Baxter Smith, on October 12, 1895, mortgaged the said tract of land to defendant R. L. Morris, as trustee, subject, however, to the prior mortgage thereon to secure a note for \$2,000, due at twelve months and payable to the Masonic Widows' and Orphans' Home. That said note is not yet due, but that nothing has been paid upon it.

“‘4. That Thomas S. Weaver, in his character as Clerk and Master, recovered the following judgments against Baxter Smith in the Chancery Court of Davidson County, to wit:

“‘On May 3, 1895, judgment for \$412.70; that execution issued on this judgment on July 23, 1895, and was returned on August 2, 1895, indorsed “No property of defendant to be found.”

“‘May 3, 1895, judgment for \$885, upon which execution issued on July 23, 1895, and the same was returned on September 29, 1895, indorsed “No property of defendant to be found.”

“‘October 25, 1895, judgment for \$117.80, upon which execution issued December 26, 1895, and was returned January 29, 1896, indorsed “No property of defendant to be found.”

“‘That to collect these various judgments Thomas S. Weaver, in his character as Clerk and Master, filed his bill on February 3, 1896, and the same is of the above consolidated causes, under the style of

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Thomas S. Weaver, Clerk and Master, v. Baxter Smith and others.

“‘5. That Thomas S. Weaver, in his character as Clerk and Master, recovered, in addition to the foregoing, the following judgments against defendant, Baxter Smith, in the Chancery Court of Davidson County, Tennessee:

“‘On November 15, 1895, judgment for \$468, upon which execution issued January 6, 1896, and was returned on February 29, 1896, indorsed “No property to be found.”

“‘November 15, 1895, judgment for \$404.25, upon which execution issued January 6, 1896, and was returned February 29, 1896, indorsed “No property of the defendant to be found.”

“‘January 10, 1896, judgment for \$696.07, upon which execution issued on February 25, 1896, indorsed “No property of defendant to be found.”

“‘October 25, 1895, judgment for \$91.20, upon which execution issued December 26, 1895, and was returned February 29, 1896, indorsed “No property of the defendant to be found.”

“‘That to collect these various judgments Complainant Weaver filed his bill in this Court, on June 18, 1896, and the same in one of the above consolidated causes, under the style of *Thomas Weaver, Clerk and Master, v. C. D. Berry and others.*

“‘6. That, in addition to the foregoing judgments, complainant, Thomas S. Weaver, in his character as Clerk and Master, recovered the following judgments

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against Baxter Smith in the Chancery Court of Davidson County:

“January 10, 1896, judgment for \$696.70, execution issued February 25, 1896, and returned February 29, “No property of defendant to be found.”

“That a duly certified memorandum of this judgment was, on March 10, 1896, registered in the Register's office of Williamson County, Tennessee, and that on May 6, 1896, an alias execution was issued on said judgment, and was returned on May 8, 1896, indorsed “No property of the defendant to be found.”

“That on May 9, 1896, complainant, Thomas S. Weaver, in his character as Clerk and Master, filed his bill in this Court, seeking to collect said judgment, and that the same is one of the above consolidated causes, under the style of Thomas S. Weaver, Clerk and Master, against Sam Pritchett and others.

“That in all of the foregoing bills it was sought to subject the interest of Baxter Smith in the said property to the payment of the foregoing judgments, subject, however, to the two mortgages mentioned above, which were prior liens upon said land. Said bills are made a part of this agreed statement of facts for the purpose of showing the allegations and charges contained in them, under which they seek to reach the interest of Baxter Smith in said land.

“7. That on October 28, 1895, one F. E. Williams, for the use of his wife, Mrs. R. E. Wil-

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liams, recovered judgment in the Chancery Court of Davidson County against Baxter Smith for \$9,590.37; that a duly certified copy of this judgment was registered in the Register's office of Williamson County, on December 2, 1895, and the same is made an exhibit to the bill of the Union Bank & Trust Company against Baxter Smith and others; that said judgment was a lien upon certain real estate in Davidson County, which, by a decree of the Court, was ordered sold to pay the same, and that said land was sold on April 11, 1896, and after satisfying certain prior liens that were on said lands and paying the costs of the case, there was realized therefrom \$7,316.74, which went to the credit of the aforesaid judgment, leaving a balance owing thereon and unpaid, as of April 11, 1896, the sum of \$2,273.63; that on April 24, 1896, said judgment was transferred to the Union Bank & Trust Company on the execution docket of the Chancery Court in the following language: "On consideration of \$2,273.63, balance due me on opposite judgment, I hereby transfer and assign to the Union Bank & Trust Company all right, title, and claim to said balance on judgment, without recourse on me in law or equity. This April 24, 1896. F. E. Williams, for the use of R. E. Williams, my wife."

"That, between April 11 and 24, 1896, said F. E. Williams directed Thomas S. Weaver, Clerk and Master, not to issue execution on said judgment until he ordered it done, and accordingly no exe-

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cution has ever been issued thereon; that the Union Bank & Trust Company filed its bill in the Chancery Court of Williamson County on May 7, 1896, to collect the aforesaid judgment, and the same is one of the above consolidated causes under the style of the Union Bank & Trust Company against Baxter Smith *et al.* The allegations and charges in said bill, upon which it is sought to reach the aforesaid land, are made parts of this agreed statement of facts for the purpose of showing the allegations and charges in them.

“‘8. That the April Term, 1895, of the Chancery Court of Davidson County began April 2, 1895, and continued in session until July 24, 1895, when said Court adjourned to the Court in course. The October Term, 1895, began October 7, 1895, and continued in session until March 30, 1896, when the same adjourned to the Court in course.

“‘It is further agreed that the judgment debtors, Baxter Smith and Hiram Vaughan, both had notice of the transfer and assignment of the judgment to the Union Bank & Trust Company in the case of *F. E. Williams, use, etc., v. Baxter Smith et al.*, in the Davidson County Chancery Court, at the time of said transfer.’

“‘Upon these facts, the question is as to the priorities acquired under these several bills. It is admitted by counsel for Weaver that the bill filed by him on June 18, 1896, is last in right, and the present contest is therefore reduced to the bill filed

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on May 7, 1896, by the Union Bank & Trust Company, and the other two bills filed by Weaver, one on February 3, 1896, and one on May 9, 1896.

“The Chancellor held that the bill of the Union Bank & Trust Company was third in point of priority, or came after the bill of February 3, 1896, and the one of May 9, 1896. Whereas, it is insisted by appellant, the Union Bank & Trust Company, that the order of priority should be as follows: (1) The debts mentioned in the bill of Weaver of February 3, 1896, (2) the Union Bank & Trust Company, (3) to the debts named in the bill of May 9, 1896.

“It will be seen that the judgments in favor of the Union Bank & Trust Company were obtained October 28, 1895, but that no execution issued on these judgments, and the bill was filed May 7, 1896.

“Now, we understand it to be practically conceded that no lien was acquired, on account of failure to issue and have return of execution until the filing of this bill of May 7, 1896, and that therefore the filing of the first bill by Weaver, on February 3, 1896, took priority. But the insistence is that, inasmuch as the complainant, the Union Bank & Trust Company, filed its bill on May 7, 1896, it acquired priority to the bill of Weaver filed on May 9, 1896, and this is unquestionably true, unless Weaver had secured and perfected a lien by reason of his judgments, issuance of execution, and registration.

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“It is to be noted that the judgment sought to be recovered in this bill was obtained on January 10, 1896, for \$696.07; that an execution was issued on this judgment February 25, 1896, and returned February 29, 1896, *nulla bona*; that the judgment was registered in Williamson County, March 10, 1896, and that an alias execution was issued on May 6, 1896, and returned *nulla bona* May 8, 1896.

“It is to be noted that the bill in this case was not filed within sixty days after the issuance or return of the first execution, but was filed within two days after the issuance and one day after the return of the alias execution. Was the judgment lien lost by this proceeding?

“This, as we understand, is the principal question and matter of contest in this case. The insistence on behalf of Weaver is that, as the bill was filed within thirty days after the issuance of the alias execution, which was returned on May 8, 1896, the lien was preserved.

“It is said that the execution that is contemplated by the provisions of the statute is the mandatory execution, and that, inasmuch as the Court did not adjourn until March 30, 1896, no execution was required by law to be issued until after that adjournment, and that the Clerk was not compelled to issue an execution except within forty days after that adjournment.

“In our opinion the execution referred to in the

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limitation imposed by the statute is the original execution whenever that may be issued. It is shown by the agreement that the term of the Chancery Court in which this judgment was obtained continued for more than four weeks. The provisions of the law in regard to the issuance of execution are substantially as follows:

“Section 4732 of the Code (Shannon) provides that the Clerks of the several Courts shall issue executions in favor of the successful party, on all judgments rendered at any term, as soon after the judgment of the Court as practicable, and within the time prescribed by this Code.

“Section 4733: ‘Clerks of the Supreme Courts shall issue executions within sixty days after the adjournment of each term.’

“Clerks of other courts of record within forty days after adjournment. And it is provided in this section (4734) that when the Court shall continue in session for more than four weeks, the Clerk may issue execution in any case at any time after thirty days after judgment therein.

“The first execution issued in this case, as shown by agreement of the parties, was issued February 25, 1896, whereas the judgment was obtained January 10, 1896—that is, more than thirty days after the judgment was obtained. This execution, therefore, was legally issued, although the Clerk was not compelled to issue the same unless affidavit had been made as provided by § 4737 of the Code

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(Shannon). And in any event, it has been decided that the presumption always is, when nothing to the contrary appears, that an execution was legally and regularly issued. See 8 Hum., 487; 4 Lea, 401.

“But we think there can be no question, and, in fact, it is not suggested, that the first execution was not regularly and legally issued. In our opinion it makes no difference that the Clerk was not compelled to issue this execution, unless affidavit was made as provided by law. Whether an affidavit was made and he was compelled to issue the execution, or whether he issued it at the request of the parties because it was lawful for him to do so, we are not informed. The point is that it was legally and regularly issued. As under the provisions of the law, the Court having continued in session for more than four weeks, it was lawful for him to issue the execution after the expiration of thirty days from the rendition of the judgment, without any cause shown therefor. So, it seems to be settled, beyond controversy, that the execution issued on February 26, 1896, was legally and regularly issued, and was the first execution issued, and it was returned *nulla bona* on February 29, 1896, and the bill was not filed within thirty days thereafter. In our opinion, by the express terms of the statute, complainant in this case lost his lien.

“Sections 4712 and 4713, Shannon's Code, are taken from Sec. 3, Ch. 11, of the Act of 1832. This section provides that a judgment or execution at

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law shall not bind equitable interests in real estate or other property, or legal or equitable interests in stock or choses in action, unless a memorandum of said judgment, stating the amount and date thereof, with the names of the parties, be registered in the Register's office of the county where the real estate is situated, in cases where real estate is to be subjected, and in all other cases in the county where the debtor resides, within sixty days from the time of the rendition of the judgment, and the lien shall cease unless the bill in equity to enforce said lien is filed within thirty days from the time of the return of the execution unsatisfied.

“Now, we think the purpose of the Legislature is clearly apparent, and it is to enforce and require prompt action on the part of a party seeking to assert a lien either on equitable interests in realty by reason of the judgment, or an execution lien on personalty, and to require him, within thirty days after he ascertained, by a proper return of an officer on an execution legally issued, that there is no property subject to execution at law, to file his bill. So, in our opinion, it does not avail the complainant, Weaver, that he might have waited for thirty-nine days after the adjournment of the Court before he had execution issued, and could then have had execution issued and returned and filed his bill within thirty days thereafter, and thus prolong the time of his lien. But having elected, as he did, to have an execution issued before the adjournment of the

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Court, and after the expiration of thirty days from the judgment, and it having been ascertained, in the mode prescribed by law by the return of the officer on execution, that there was no legal estate subject to execution by the express terms of the statute, he lost his lien unless he filed his bill within thirty days from this return establishing this fact.

“The lien given in these cases is a statutory lien, which has always been strictly construed, and is lost if the provisions of the statute are not complied with. *Chapron v. Cassaday*, 3 Hum., 660; *Bridges v. Cooper*, 14 Pickle, 394, and cases there cited.

“Let us suppose that in this case the Court had adjourned on January 10, the day on which the judgment in this case was rendered. Then, under the theory of counsel for complainant, Weaver, at all events, the execution within the purview of the statute, which they say was the mandatory execution, would necessarily have had to have been issued on February 20. Suppose it had been so issued, and the officer, as he legally might have done, had at once returned the execution *nulla bona*, making his return say on February 21. Then certainly complainant's lien would have been lost if his bill had not been filed within thirty days thereafter, or on March 21. Whereas, as a matter of fact, in this case it was not filed until May 9. So, we think it clearly apparent that there is no merit in the contention of the counsel for the complainant that

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the execution contemplated by the limitation of the statute is the mandatory execution.

“We concur with counsel to the extent that the complainant, claiming such a lien, could not wait, say for ten or eleven months, and prevent the issuance of an execution and thus extend his lien. As said in the case of *Stahlman v. Watson*, 39 S. W. Rep., 1060, “The execution contemplated is one which shall be issued as soon as the creditor may legally cause the issuance.” See, also, to the same effect, the opinion by Judge Cooper in *Ridley v. Motley*, 1 Lea, 468.

“We are, therefore, of the opinion that, where an execution is held up and not issued beyond the time in which the Clerk is required by law to issue it, and certainly when thirty days thereafter have expired, the lien would be lost. But we are further of the opinion, in the words of Judge Cooper, just cited, that it is the execution which may be first legally issued, and which is legally issued, the original execution.

“We think that by the express terms of the statute, when an execution is thus legally issued and returned, the bill must be filed within thirty days thereafter, or the lien of the judgment is lost. This is as much a matter of necessity as it is for him to register a memorandum of his judgment within thirty days after its rendition. They are separate provisions, but both absolutely necessary.

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And, as said above, this statute must be strictly complied with or the lien is lost.

“We are therefore of the opinion that, in this case, the complainant having waited for more than thirty days after the return of the execution issued on the twenty-sixth and returned on the twenty-ninth of February, his lien was lost. And while he acquired a lien by the filing of his bill, it only dated from that time, viz., the ninth of May, when, as is conceded, the complainant Union Bank & Trust Company had obtained a lien by the filing of its bill on May 7.

“For the same reasons here given the complainant Union Bank & Trust Company had lost its lien by reason of its judgment and registration, and only acquired a lien on May 7 by the filing of its bill.

“It results in our opinion that the Chancellor was in error in fixing the order of priorities, and that they should be as follows: First in right, the bill of complainant filed February 3, 1896; second, the bill of the Union Bank & Trust Company filed May 7, 1896; third, the bill filed by Weaver May 9, 1896; fourth, the bill filed by Weaver June 18, 1896, and a decree will accordingly be so entered. The cost of the appeal will be paid by the complainant Weaver, the cost below as adjudged by the Chancellor in the several cases. All concur.”

Before this Court a very able and earnest argument is made that the construction thus given

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to the Act and the rule thus laid down by the Court of Chancery Appeals will have the effect to curtail the sixty days' lien given by the statute upon the registration of the judgment if an execution is issued and returned within thirty days after the judgment is rendered, and this contention is undoubtedly correct.

The Code does not say in express terms that the right to register and acquire a lien for sixty days shall be forfeited by the issuance and return of an execution within the thirty days after judgment and before the lien would expire.

It is plausibly said that the creditor ought to have both rights—that is, to immediately issue his execution when occasion justifies and afterwards register his judgment and have its lien preserved for the full sixty days, and that the sixty days is given the creditor to see if he can make the debt by execution. The reasoning is that the statute gives sixty days in any event as a result of registration, whereas, by this ruling, this right is destroyed if execution is taken out and returned before the judgment is registered, and the limit of time must then date from the return of the execution. We are of opinion the Court of Chancery Appeals is correct, and, construing the statute as a whole, it is intended to limit the time when the bill may be filed to the thirty days after the return of the original execution whether it is issued in the time prescribed by statute or previously, and whether before or af-

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ter the registration. We feel that we can add nothing to the very able and lucid opinion of the Court of Chancery Appeals, and we adopt it as the opinion of the Court, with this addition: The costs of the Court below have not been adjudged and the costs of the appeal have been adjudged against Weaver. We direct that the costs of both Courts be equally divided, and to that extent the decree of the Court of Chancery Appeals is modified; in all other things affirmed.

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TRUST CO. v. WEAVER.

(Nashville. March 8, 1899.)

1. EXECUTION. *Issued after debtor's death.*

Under an execution issued after, but tested before, the debtor's death, personalty belonging to his estate may be levied on and sold. (*Post*, p. 68.)

Code construed: § 4731 (S.); § 3717 (M. & V.); § 3001 (T. & S.).

Cases cited and approved: *Preston v. Surgoine*, Peck. 80; *Black v. Bank*, 4 Hum., 368; *Harvey v. Berry*, 1 Bax., 252.

2. SAME. *Leviable on stock of corporations.*

The stock in all domestic private corporations, whether organized under the Code provisions or under other valid statutes, is, under our statutes and decisions changing the common law, personal property and subject to levy of execution. (*Post*, pp. 68-73.)

Code construed: § 2066 (S.); § 1714 (M. & V.); § 1487 (T. & S.).

Acts construed: Acts 1875, Ch. 140; Acts 1889, Ch. 267.

Cases cited and approved: *Memphis, etc., Pub. Co. v. Pike*, 9 Heis., 702; *Young v. Iron Co.*, 85 Tenn., 194.

3. SAME. *Same.*

Under the Code provision subjecting stock in all private corporations to levy of execution, whether formed under the Code or created theretofore or thereafter "by special law," the term "special law" is not to be understood, in its application to corporations formed since the Constitution of 1870, in the sense forbidden by that Constitution, but as embracing all laws outside of the Code, of a general character, enacted for the creation of private corporations. (*Post*, pp. 69-73.)

Code construed: § 2066 (S.); § 1714 (M. & V.); § 1487 (T. & S.).

Cases cited and approved: *Memphis, etc., Pub. Co. v. Pike*, 9 Heis., 702; *Young v. Iron Co.*, 85 Tenn., 194.

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4. DEMURRER. *Bad, when.*

A demurrer is bad, as a speaking demurrer, which seeks dismissal of an administrator's bill enjoining the sale under execution levy of corporate stock held by his intestate as "trustee" or "treasurer," upon the assumption, not justified by the averments of the bill, that said words are to be rejected as surplusage, and the stocks treated as the intestate's individual property. (*Post*, pp. 73, 74.)

5. SAME. *Same.*

A demurrer is bad to an administrator's bill enjoining sale under execution levy of corporate stock belonging to his intestate's estate, where there is an averment that the intestate's title is involved in such doubt as may cause sacrifice if sale is made before the title is cleared up. (*Post*, pp. 74, 75.)

6. JUDICIAL KNOWLEDGE. *Not taken, when.*

In passing upon a demurrer to an administrator's bill enjoining sale under execution levy of corporate stock belonging to his intestate, the Court will not take judicial notice that the corporation whose stock is involved is a foreign corporation that has not been domesticated, in order to raise the question as to the liability of stock of a foreign corporation to levy under execution. (*Post*, pp. 74, 75.)

7. INJUNCTION. *Of execution sale, does not lie, when.*

An administrator cannot enjoin the sale, under a lawful execution levy, of a valuable painting belonging to his intestate's estate, upon the ground that there is no local market for the same, and that, to prevent sacrifice, it should be sold in a foreign market. (*Post*, pp. 75, 76.)

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
H. H. COOK, Ch.

STEGER, WASHINGTON & JACKSON for Trust Co.

CHAMPION, HEAD & BROWN for Weaver.

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CALDWELL, J. William T. Smith died intestate at his residence in Davidson County, Tennessee, and thereafter executions, issued on recent decrees in the Chancery Court of that county and tested prior to his death, were levied on about \$14,000 of corporate stock in the Security Home Building & Loan Association, a certificate for \$2,500 of stock in the Chesapeake & Ohio Railroad Company, and a large oil painting, as assets of his estate. After the levy his administrator, the Nashville Trust Company, filed this bill to enjoin the sale. The Chancellor dismissed the bill upon demurrer, and the Court of Chancery Appeals affirmed his decree. Complainant appealed.

The different questions arising in the case can be best stated and considered separately.

1. The fact that the levies in question were made after the death does not impair their legal force. "Court executions are tested of the first day of the term next before the date of issuance." Code, § 3001; M. & V., § 3717; Shannon, § 4731. And when, by that rule, properly tested of a day anterior to the death of the judgment debtor, as in this instance, they may be levied upon his personalty, and sale thereof may be had as if he were living. Being, in fact, alive at the date of the teste, he is, in law, assumed to be alive at the date of the levy. *Preston v. Surgoine*, Peck, 80; *Black v. Bank*, 4 Hum., 368; *Harvey v. Berry*, 1 Bax., 252. This proposition is not controverted in the bill.

2. The complainant alleges that the Security Home

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Building & Loan Association, in which Smith, the decedent, held the \$14,000 of stock levied on, is a Tennessee corporation, chartered and organized under Ch. 142 of the Acts of 1875, as amended by Ch. 267 of the Acts of 1889; and that said stock is, therefore, not subject to execution. The demurrer disputes the legal conclusion drawn by the complainant from the facts alleged.

Under the common law corporate stock was not subject to execution. *Nashville Bank v. Ragsdale*, Peck, 296; 23 Am. & Eng. Enc. L., 632. Hence, authority for the levy here complained of, if it exists, must be found in some statute of the State.

Section 24 of Ch. 72 of the Acts of 1849-50 contained the provision that stock in all turnpike companies in this State "shall be deemed and held personal property," and "shall be subject to levy and sale as other personal property." By the Code of 1858 (which was itself an enactment, *Runnels v. State*, 92 Tenn., 320), that provision was greatly enlarged and made to read as follows: "The stocks in all private corporations formed under this chapter, or heretofore created, or to be hereafter created, by special law, are personal property and subject to levy and sale as such, the company in such case being required to make the proper entries in its stock or transfer book; but such sale will not relieve a stockholder from liability which had attached to him as such previous to the sale, neither will a

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voluntary sale.” Code, § 1487; T. & S., 1487; M. & V., § 1715.

The corporations whose stock is by this statute declared to be subject to execution are of two classes in respect of the manner of their creation—those “formed under this chapter” and those “created by special law.” Manifestly the Security Home Building & Loan Association, as to whose stock the present inquiry is being made, is not one of the former class, because that class includes only turnpike, rail, and plank roads (Code, §§ 1400–1446), manufacturing, quarrying, and mining companies (Code, §§ 1447–1466), and educational and religious societies (Code, 1467–1473); and further because it was not, in fact, formed under that chapter, but under subsequent legislation.

Whether or not this association is of the latter class, as one “created by special law,” is not so readily determined. If by “special law,” as used in the provision of the Code quoted, is meant a particular Act passed for the single purpose of chartering a specific corporation, with an individual name and certain prescribed powers and responsibilities as was at that time allowable and not unusual, then this association was not “created by special law;” nor, indeed, could it have been created, lawfully, by such an Act since the adoption of the Constitution of 1870, for the second clause of the eighth section of the eleventh article of that instrument declares that “no corporation [meaning private corporation,

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Williams v. Nashville, 89 Tenn., 487] shall be created or its powers increased or diminished by special laws." The same clause of the Constitution declares that "the General Assembly shall provide, by general laws, for the organization of all corporations [meaning private corporations, *Williams v. Nashville*, 89 Tenn., 487] hereafter created."

In due observance of this prohibition and mandate of the present organic law, the General Assembly has from time to time enacted "general laws" (Acts 1875, Ch. 142; Acts 1889, Ch. 267, being some of them), and thereby made ample provision for the organization of any number of each and every kind of private corporation permitted in this State.

The Security Home Building & Loan Association was chartered and organized under these laws, and, consequently, cannot be truly said to have been "created by special law," as contemplated by § 1487 of the Code, if the law there meant was of the same kind as that prohibited by that clause of the Constitution of 1870 just mentioned. It is at least highly plausible to say, as contended by counsel for complainant, that the same kind of law was in contemplation in each instance; and, but for cases heretofore decided, we would be disposed to hold such to be true, and, upon that holding, to adjudge the stock of this association not subject to execution.

In the case of *The Memphis Appeal Publishing Co. v. Pike*, 9 Heis., 702, Judge Nicholson, speak-

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ing for the Court in reference to § 1487 of the Code, in connection with other sections (3034 and 3035), not affecting the question involved in the present case, said: "It is clear that they (the legislators) intended to make stocks in all private corporations liable to execution, as all personal property is liable," etc. Following that case it was subsequently said in *Young v. South Tredegar Iron Co.*, 85 Tenn., 194, that stocks in all private corporations are by statute declared to be personal property, and subject to execution as such.

Those cases did not discuss the different parts of the statute or analyze its phraseology, but to have reached the conclusion broadly announced the Court must have proceeded upon the idea that the words "special law," as used in § 1487 of the Code, meant any legislation for the creation of private corporations other than the general provisions set forth in that chapter. With such a construction of those words the conclusion there enunciated naturally follows; and the Acts under which the Security Home Building & Loan Association was organized are in that sense "special law," though in their scope and in contemplation of the Constitution of 1870 they are "general laws."

Adopting the conclusion announced in those cases, upon the interpretation just stated as its basis, we hold that the stock of the association in question was subject to execution, and that the demurrer to

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that particular part of the bill was properly sustained.

Shannon, in his compilation of the statutes of the State, has so changed the language of § 1487 of the Code as to make it read as follows: "The stock in all private corporations is personal property, and subject to levy and sale as such," etc. Shannon, § 2066. This change, though a departure from the true province of a compiler, makes the language employed by him conform to and express the construction presented herein as the result of the two cases cited.

3. The bill alleges that certain shares of the stock of this association, levied on by the defendant, were held by Smith, as treasurer, and that certain other shares of that stock so levied on were held by him as trustee. The demurrer to this part of the bill was bad, and should have been overruled. Corporate stock held by a debtor in a fiduciary or trust relation is not subject to execution running against him individually.

If it be true, as suggested in behalf of the defendants, that the words "treasurer" and "trustee" are matters of surplusage in this instance, and that Smith really owned the shares so designated in his own right, that fact can be made to appear only by answer and proof. No such fact is disclosed in the bill, which, upon demurrer, must be tried by its own allegations. The assignment of demurrer that seeks to bring forward such assumed fact is

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bad because it is a speaking demurrer. The several propositions of law just stated as to this branch of the case are so unmistakable as to require no citation of authorities to sustain them.

4. The complainant alleges in the bill that the certificate for \$2,500 of stock in the Chesapeake & Ohio Railroad Company was issued to another person, and by him indorsed in blank; that complainant does not know to whom it belongs, but presumes that it belongs to Smith's estate, and that it is necessary to settle the question of title before sale to prevent a sacrifice of the stock.

In its assignment of error to the action of the Court of Chancery Appeals in sustaining the demurrer to this part of the bill, the complainant asserts that the Chesapeake & Ohio Railroad Company is a foreign corporation, and that its stock is, therefore, not subject to execution in this State. The fact of nonresidence thus asserted cannot be considered by the Court at this time, nor its legal effect, if true, determined, because the bill does not allege that the company is a nonresident. To decide that question now the Court would be compelled, in advance, to assume, as matters of judicial knowledge, first, that the company was chartered in another State, and, secondly, that it had not been domesticated under the laws of this State. This we cannot do in whole or in part.

The doubtful statement of the bill as to the true ownership of this stock is sufficient to require an

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answer and investigation of the facts. The demurrer to this part of the bill, also, should have been overruled.

5. Finally, the complainant alleges that the picture levied on is very valuable, being "a painting by Madame Lemaire, of Paris, France, and known as (La Samile) "The Sleeper;" that it cost complainant's intestate \$2,500; that "there is no market for such property in Nashville," where it is seized, "and to sell it here under execution would be a great and unnecessary sacrifice of the estate." It is further alleged that "the only market in this country for such property known to complainant is New York City." Upon these allegations, and with a view of saving "the rights, both of the estate and of its creditors," the complainant asks that the sale under execution be restrained and the painting "sold in a manner to save the rights and interests of all parties."

Though an unusual case is presented by these allegations, they do not justify the interposition of a Court of equity. No ground of equitable relief is disclosed. It may be true that the picture will not bring its value if sold under execution in Nashville, but that fact alone does not call for injunctive interference. The bill assigns no reason why a better price would or could be realized by a sale through the Chancery Court. If the Master should take the painting out of the State in search of a purchaser, he might, perchance, ultimately secure a larger sum

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for it than the Sheriff can get here, but we are aware of no authority for directing such a course as that. And besides, the Court cannot say, with any degree of assurance, that even that plan would result in a net gain to the estate. It might prove to be a profitless experiment.

Enter decree in accordance with this opinion and remand for further proceedings as to the stock standing in the name of Smith as treasurer and as trustee and as to the Chesapeake & Ohio Railroad Company stock.

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FOX AND WHEATLEY v. FOX.*(Nashville. March 11, 1899.)***1. WILLS.** *Bequest absolute when.*

After testator had made many bequests, all absolute except one given with strict limitations to a trustee for the benefit of an improvident son and his family, he, in a distinct and separate clause of the will, provided that any surplus that might remain of his estate, after payment of all said bequests, should "be divided between those named in my [his] will in the same proportion that my [his] estate bears to their respective bequests." There was a surplus of the estate for distribution. *Held:* The improvident son takes absolutely, and without any limitation whatever, a share of this surplus proportionate to the bequests made to the trustee for the benefit of himself and family in preceding clauses. (*Post*, pp. 79-85.)

2. SAME. *The intention that controls in construction.*

The intention of a testator that controls in the construction of his will is that intention which is expressed in the will or is fairly inferable from its terms. The Court will not give effect to an intention, though morally certain that it existed in the testator's mind, unless it has found expression in his will. (*Post*, pp. 84-86.)

Cases cited and approved: 34 Am. St. Rep., 64; 7 Metc., 188.

3. SAME. *Bequests separate and independent, when.*

Several independent bequests, not grammatically connected or united by the expression of a common purpose, must be construed separately and without relation to each other, although it may be conjectured, from similarity of relationship or other such circumstances, that the testator had the same intention in regard to both. There must be an apparent design to connect them. (*Post*, pp. 86-90.)

Cases cited and approved: 25 Ch. Div., 538; 64 Md., 306.

Cases cited and distinguished: *Vancil v. Evans*, 4 Cold., 340; *Ewin v. Park*, 3 Head, 712; *Brown v. Cannon*, 3 Head, 355.

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4. SAME. *Presumption against restrictions on legacy.*

It is a safe canon of construction that if the language of a will leave it doubtful whether or not the testator intended to incumber a legacy with a trust, or in any way restrict or limit it, the benefit of the doubt should be given to the legatee. (*Post*, pp. 91, 92.)

5. SAME. *Presumption in favor of heir.*

It is an established rule of construction of wills that the law favors the heir, and that, therefore, the property disposed of shall, as near as may be consistent with the terms of the will, follow the laws of descent and distribution. (*Post*, p. 92.)

FROM MARSHALL.

Appeal from Chancery Court of Marshall County.
W. S. BEARDEN, Ch.

MARSHALL & ARMSTRONG and J. J. VERTREES for
Fox and Wheatley, Executors.

J. A. PITTS, M. H. MEEKS, and H. C. LASSING
for J. L. Fox.

WILKES, J. The original bill in this case was filed by the executors of P. Fox, Sr., to construe his will. To it his son, J. L. Fox, and his wife and minor children were made defendants.

The first item of the will provides for the payment of debts, funeral expenses, and a suitable monument; the second gives the widow a certain tract of land for life and \$1,500 in money absolutely; the third provides for the children of his deceased son, Wm.

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Fox; the fourth gives to his son, Pervines Fox, Jr., \$1,200.

The fifth clause, which is one to be especially considered, is as follows:

“I further will that Pervines Fox, Jr., as trustee for J. L. Fox, have, for the use of said J. L. Fox, the farm on which he now lives, known as the Wiley Davis place, and that he also have the sum of \$5,000 free from any indebtedness and from any advancements by me to him. Said J. L. Fox is to have the use and occupancy of the land for the benefit of himself and family, and the interest of the \$5,000 the same way, but in no event are either to be subject to his debts or contracts, neither the principal or interest or the proceeds of said land. After the death of J. L. Fox, his widow, if living, shall have the use and occupancy of the land for herself and the children of J. L. Fox while she is single; but if she marries, then the trustee is to let his children have the benefit of the same, and at his death the children of said Fox will take the land and money absolute, subjecting the land, as above stated, to his widow, other money to be paid to them when they arrive at age. But in the event that J. L. Fox shall live, for five successive years after my death, a sober, industrious life, and tries to save, then he himself is to have said money, to do with it as he may wish, and his trustee will pay the same to him when this may happen. The County Court will take a bond from his said trus-

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tee, in the sum of \$10,000, for the faithful performance of his duty, and shall remove him whenever it is shown that he is in any way not doing his duty.”

The sixth clause gives to J. G. Fox \$10,000; the seventh gives to W. H. Wheatly the remainder of the land given to the widow for life; and to said Wheatly and other children of Mary Wheatly, deceased, pecuniary legacies as follows: Samuel P. Wheatly, \$1,500; John W. Wheatly, \$1,500; Frank Wheatley, \$1,500; W. H. Wheatly, \$10,000, and to “W. H. Wheatly, in trust for his sister, Mrs. Mattie Taylor, the sum of \$1,500, to be invested in a home of her own selection, for self, and, at her death, to dispose of as she may wish, but in no way to be liable for her husband’s debts or contracts.”

The eighth clause is as follows: “I further will and desire that my executors, so soon as practicable after my death, convert all my real and personal estate into cash, and I here give them full power to transfer any real estate I may own at my death not herein conveyed by deed and make title thereto without the aid of the Court wherever it is practicable to do so, and that they pay the bequests herein made, but if it shall be that I have not a sufficiency to pay all the bequests in full, then that they be paid in pro rata to the amount of each bequest, and if there should be more than is necessary to pay all these bequests, then the remainder

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will be divided between those named in my will in the same proportion that my estate bears to their respective bequests, except the amount given to my wife, which is not to be increased or diminished by the amount of my estate.”

The ninth clause provides for forfeiture by any legatee who may attempt to break the will, and the tenth and last clause simply nominates executors and prescribes the bond to be given by them.

There turned out to be a large surplus after payment of the amounts named in the will, and the question is whether the part of this surplus apportionable to the share of J. L. Fox, or to Pervines Fox, Jr., as trustee for J. L. Fox, goes to J. L. Fox directly and absolutely or to Pervines Fox, Jr., as trustee for J. L. Fox under the trusts and limitations of the fifth clause.

The will is dated April 16, 1886, and the testator died August 16, 1887. The executors soon thereafter qualified, and, after proceeding with the execution of the will and paying the specific legacies, ascertained that there would be a large surplus for division under the eighth item of the will. They thereupon filed a bill asking a construction of the will and instructions as to whether the share going to J. L. Fox out of this surplus should be paid to him absolutely or to his trustee under the limitations of the fifth item of the will, and asking the Court to fix a proper basis for the distribution and division of the surplus.

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J. L. Fox answered the bill and insisted that the share coming to him out of the surplus should be paid to him absolutely and free from the restrictions and limitations of the fifth clause, while his children, by guardian *ad litem*, insisted on the contrary construction, and that such interest should be affected by the trusts and limitations of the fifth item.

The Chancellor held with the contention of J. L. Fox that his share in the surplus should be paid to him and held by him free of any limitations or restrictions. This decree was rendered June 18, 1892. Whether the executors have paid out the fund or not does not appear. On November 26, 1898, the minor children of J. L. Fox, by next friend, obtained a writ of error to this Court and seek to review this decree and set it aside for error on its face.

It is insisted that the decree improperly fixes the basis for distribution, but it seems that this feature has been settled satisfactorily to all parties and the basis of distribution is not before us at this time. The question presented to us is, did J. L. Fox take the share of the surplus apportioned to him absolutely or under the trust restrictions and limitations of the fifth clause? The Court of Chancery Appeals held the latter view, reversing the decree of the Chancellor, and the cause is before us on appeal of complainant.

It appears that J. L. Fox's share of the surplus

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will amount to about \$5,000. The will is inartificially drawn, and it is evident the testator did not fully appreciate the extent of his estate. He evidently supposed that he had given away the whole or greater part of his estate by the specific legacies and bequests he had made, and he was uncertain whether there would be a surplus or a deficit. He therefore provided for an abatement of the specific legacies in the event the estate was not sufficient to support them, and, on the other hand, provided for the distribution of the surplus in the event there should be a surplus.

It is evident from the whole will that he considered this a matter of but little importance and that the surplus or deficit, as the case might be, would be small. If he had known that the surplus would be so large as it has proven to be he would have shown himself more solicitous as to the provisions relating to it and would not, perhaps, have provided for a deficit. The first idea that impresses itself is that, believing this surplus, if any, would be small, he was not solicitous to tie it up with restrictions and limitations and evidently thought that by the fifth item he had provided a fund sufficient to protect his son's family from his extravagance, and did not intend to tie up the small surplus that might arise under the eighth item or any fund which might arise under the ninth item.

The testator evidently intended to put the land set apart for J. L. Fox in trust, and to keep it

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in trust continuously, but as to the \$5,000 he was not so strict, and it has to go to his son absolutely if he kept sober and tried to save for five years. How this was found to be we have no means of knowing.

It was not the purpose of the father to tie up any part of the property given his son continuously and for all time except the land, and we are of opinion that, by not specifically directing that his share in the residue should be impressed with the trusts and limitations of the fifth clause, he did not intend that it should be affected thereby.

It is probable that if the testator had known that J. L. Fox's share in the surplus would be as much as \$5,000—that is, equal to the specific legacy he had given him, he might have been disposed to hedge it around with restrictions and limitations at least for the same length of time provided for the \$5,000 legacy.

The question is not, however, what he would have done with that state of facts before him, but what did he do with evidently a different state of facts in his mind? Likewise, if he had anticipated that many of his legatees and devisees would contest his will, he might have tied up the amounts J. L. Fox would receive on account of that state of things, but he did not look on this as a probable result, and hence made no provision to limit any amount derived under these conditions.

We are of opinion that, under the residuary clause,

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the amount going to J. L. Fox would go absolutely, just as his share in any forfeited legacy or devise would do under the ninth item. Both provisions are contained in the eighth and ninth clauses of the will, and there is no limitation expressed in either. No limitation or restriction can be imposed except it is done by express words or such connection between the two provisions as reads one into the other. It is true the intention of the testator is to prevail, as in all cases of the construction of wills. But this intention can only be learned from the words used in the will. Indeed, it may appear morally certain that the testator may have, in his mind, intended a certain thing, but unless he has expressed that intention, either by writing it into his will in express terms or by necessary implication and construction, it cannot prevail.

The question is not what the testator intended in his mind, but what is the meaning of his words and his intention as shown by them. 2 Woerner's Am. Law, Sec. 414; Pritchard on Wills, Sec. 384; Beech on Wills, Sec. 311: *Pringel v. Voltz*, 34 Am. St. Rep., 64. An illustration of this idea is found in the case of *Tucker v. Seaman's Society*, 7 Metc., 188. This will gave a legacy to the "Seaman's Aid Society." The Seaman's Friends Society claimed the legacy, and offered evidence to show that the testator did not know there was such a society as the one named in the will, but did know of the other, and was deeply interested in its objects, and

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had been accustomed to contribute to it, and had frequently expressed a determination to give it a legacy. But all this was held inadmissible because there was a society like that named in the will and the only one of that name. Thus it was that the real intention of the testator could not prevail because he had not written it in his will, but his property went in a direction he did not design, because the intention expressed in the will so indicated.

It is said that the intention to dispose of the whole estate by the first seven clauses of the will appears by their provisions, but we think directly the reverse; that the testator anticipated there might be a surplus, and this was to be disposed of by the eighth clause. No doubt the amount passing under this item is greater than he expected, and if he had known of the amount he might have provided differently, but the fact recurs that he did not do so.

It is insisted that the amount passing under the eighth item must be considered as a legacy added to the one given in the fifth item—that is, in the nature of an accretion to it, and therefore subject to the same restrictions and conditions under the rule laid down in the text-books and cases. Beach on Wills, Sec. 313.

But the question arises, is this an added legacy or an independent one? A case in point is that of *Reid v. Walback*, 75 Md., 205; 8 Am. Pro. Rep., 131. Mrs. Whelon made a will containing thirty

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clauses and four codicils. The will and three of the codicils gave property to trustees for Mrs. Walback, a daughter of the testatrix, but gave it to trustees for her life, and at her death to her children then living. Clause twenty-eight was the residuary clause. It gave all the residue to three daughters, Mrs. Walback being one of them. It said, "To my daughter Jane Margaret (Walback) one-fourth part thereof." One question was whether the residuary fund went to Mrs. Walback absolutely or to be under the limitations of the trust created by the previous clauses. The Court held that it passed to her absolutely, unfettered by the trust.

The rule as laid down by Mr. Jarman in his work on Wills, Vol. 3, p. 708, is applicable. That rule is this: "Several independent devises, not grammatically connected or united by the expression of a common purpose, must be construed separately and without relation to each other, although it may be conjectured from similarity of relationship or other such circumstances that the testator had the same intention in regard to both. There must be an apparent design to connect them." Jarman on Wills (6th Ed.), 1657; *In re Johnston*, L. R., 25 Ch. Div., 538, 545; 2 Woerner Am. Law, Ad., Sec. 416.

The cases of *Buchanan v. Loyd*, 64 Md., 306; 5 Am. Prob. Repts., 30, and *Doc. Dem., etc., v. Westley*, 4 Barnwell & Cresswell, 667, are also in point.

We are cited to the case of *Vancill v. Evans*,

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4 Cold., 340, as sustaining the contention of the minors. The syllabus of that case is as follows: "The rule of construction, that the last clause of a will must prevail over the first clause, applies in cases only where the two clauses are incompatible and contradictory, and cannot, for that reason, stand together. But where a former legacy is given with a limitation to other parties, a second legacy given in general terms will go to the same parties and be limited over in the same way; or, when one legacy is given in addition to the former legacy, it will be construed as subject to the same conditions as the former." The Court cites for this proposition *Crowder v. Clowes*, 2 Ves. Jr., 449, and Redf. on Wills, 360, and authorities cited.

Mr. Redfield, at the page just cited, lays down the rule as follows, citing numerous authorities: "It seems to be well settled that where legacies are given expressly upon the same terms as former ones, or where one legacy is given in substitution for another, or where it is given in addition to a former legacy, it will be so construed as to be raised out of the same fund, and subject to the same conditions as the former one."

Mr. Williams, in second volume of his work on Executors, bottom page 1084, after stating the general rule that where there is no connection by grammatical construction or direct words of reference, or by the declaration of some common purpose, between distinct bequests in a will, aid cannot be drawn in

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the construction of special terms in the one from those of another, adds: "The tendency, however, of modern decisions (and good sense appears to require it) is to read the different clauses in the will referentially to each other, unless they are clearly independent."

These text-books, as we think, lay down the correct rule, but it was misstated in the case of *Vancil v. Evans*, 4 Cold., 340. The Court of Chancery Appeals followed, and evidently were controlled by, this case. The crucial inquiries are, whether the legacies are given expressly on the same terms as former ones, or in substitution for the former, or in addition, and as an accretion to a former legacy. In all these cases the added or substituted legacy will be subject to the same conditions as the former one, but this is not the rule where the legacies are independent and not substituted or added.

The case of *Crowder v. Clowes*, 2 Ves. J., 449, was a case of additional legacy of two hundred pounds, clearly connected by express reference with the former legacy and an accretion to it, and it is only in similar cases that the added legacy takes the limitations of the former one. 1 Jar. on Wills, 183 (Bigelow, Ed. 1893).

The case of *Ewin v. Park*, 3 Head, 712, is cited by counsel in support of the contention of the minors, but it is distinguished from this in the fact that in that case one-half of whatever amount Catherine D. J. should receive under the will was to

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pass under the trust, whether it was that portion directly going to her or that part contingent upon the death of Benjamin Russ, but no specific sum was set apart to pass under the trust and be subject to it as in this case. Hence, the Court, in that case, held the language to mean all and every amount which, under the terms of the will, passed directly or indirectly to Catherine, should be divided, and one-half pass under the trust. Such is the evident meaning of the language used in that case, but it is not in point in this case where the amount limited is fixed and specially named.

The case of *Brown v. Cannon*, 3 Head, 355, is also cited, but is distinguishable upon the ground that the second legacies were substitutes for the first, and it was so expressly stated, in the opinion of the Court, that such substitution would not change the character of the title nor the trusts attached to the property. Here there is no intention to substitute, and the case of *Brown v. Carman*, 3 Head, 355, is not in conflict with the rules laid down in this case. The contention for the minor is virtually that really nothing passed directly by the residuary clause, and that it did not of itself dispose of any residue, but that it simply served to increase the legacy given by the fifth item and under its limitations. It would have been easy to say so if this had been the intention, and it is difficult to see why it would not have been so expressed if the testator intended to limit this surplus. It cannot be the rule that all

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residuary clauses are mere suffixes and additions to previous clauses to operate simply as an enlargement of specific legacies already given, when those given are restricted and impressed with a trust, and those contained in the residuary clause are not. In this will the residuary clause does not in any way refer to the legacies, but deals alone with the surplus remainder.

The only connection between the fifth and eighth items is not by an express reference, but the fifth item may be looked to simply to ascertain who are the parties to take under the eighth item, and the proportions in which they are to take. But there is no allusion in the eighth item to the limitations contained in the fifth, and it would have been perfectly easy, and the natural thing, to have said in the eighth item, disposing of the surplus, that it should be held on the same terms and limitations as the legacies already given, if such had been the intention. The two items are separated by the sixth and seventh items, and there is no expressed or apparent design to connect them; but the eighth only refers to prior portions of the will to ascertain who are the beneficiaries and in what proportion they take. Now, of course, the will must be construed as a whole, and not in detached fragments; but this does not mean that items must be connected together so as to bear upon and influence or control each other unless an intent to make them do so can be gathered from the will itself. We think it is a

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safe canon of construction that if the language of a will leaves it doubtful whether or not the testator intended to incumber a legacy with a trust, or in any way restrict or limit it, the benefit of the doubt should be given to the legatee.

It is a rule well established that in the construction of wills the law favors the heir, and that the property shall, as near as may be consistent with the will, follow the laws of descent and distribution, and there should be an intent manifest in the will to effect a change.

Some stress is laid upon the language in the eighth item that the surplus there referred to should be divided among those named in the will, and it is argued, and the Court of Chancery Appeals held, that this means to the trustee of J. L. Fox, inasmuch as he is the party named to take under the fifth item of the will, and there is no gift to J. L. Fox separately either absolutely or otherwise. But it is evident that this testator did not use terms and words with strict legal precision, and it is also evident that he meant that the parties beneficially interested in his estate and named as beneficiaries should take. It is evident that the testator when he refers to those "named in his will," in the eighth item, had in mind the same persons named as his heirs to take forfeited shares under the ninth item of the will.

While we are satisfied that the testator did not impress this surplus with the trusts and limitations

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contained in the fifth item of the will, but it was to go absolutely to the parties beneficially interested in the will, a question of some apparent difficulty arises as to who shall take the surplus absolutely under the provisions of the eighth item. We have already held that it was intended to be given the parties who were beneficiaries under the will. It is evident that the testator intended the wife and children of J. L. Fox to take a beneficial interest under the fifth clause as well as J. L. Fox himself, and it was the object and purpose of the testator that all should receive benefits from it. This being so, the question is not whether J. L. Fox's trustee is to take the surplus, for, not being beneficially interested, he can, in our view, take nothing; but whether J. L. Fox takes this surplus separately or in common with his wife and children. They are all named in the fifth item and each takes a beneficial interest, but the beneficial interest which the wife and children take is only by virtue of the trusts and limitations imposed by that item, and if the surplus does not pass under the trusts and limitations, it follows that J. L. Fox separately takes the surplus, as he alone is named in the item as beneficially interested in the absence of any trust or limitation. The conclusion is that the testator, in his special legacies, fixed such trusts and limitations as he desired to apply to them and the residue of the estate he gave to the same parties beneficially

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interested in the special legacies, but to take absolutely and free from any trusts or limitations.

To the extent herein indicated the decree of the Court of Chancery Appeals is reversed and modified, but as to costs and in the order for remand is affirmed.

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JONES v. NIXON.

(Nashville. March 15, 1899.)

1. BILL QUIA TIMET. *To prevent cloud on title.*

A vendor who has conveyed a perfect title with full covenants of warranty and placed his vendees in possession, can maintain a bill *quia timet* to prevent and enjoin the clouding of that title by confirmation of a sale of the property to a third party, made in a chancery cause to which neither he nor his vendees, nor other person having title thereto, were parties. (*Post*, pp. 96-102.)

2. SAME. *Same.*

Bills *quia timet* lie to prevent, as well as to remove, clouds on title, and the same principles are applied in both classes of cases. (*Post*, pp. 97-99.)

Cases cited and approved: *Merriman v. Polk*, 5 Heis., 717; 5 Paige, 492; 63 N. Y., 489; 130 Mass., 16; 2 Cal., 588; 72 Ill., 606; 5 Ohio, 178.

3. SAME. *Entertained where challenged claim is void.*

Bills *quia timet* to prevent or remove clouds on title are entertained by Courts of Equity alike, whether the instrument or proceeding complained of is or is not void at law, and whether it be void from matter appearing on its face or from proof taken in the cause. (*Post*, pp. 99, 100.)

Cases cited and approved: *Jones v. Perry*, 10 Yer., 59, 83; *Almony v. Hicks*, 3 Head, 41; *Porter v. Jones*, 6 Cold., 318; 1 Johns. Ch., 517.

4. SAME. *Maintainable by party without title or possession, when.*

Although a vendor has parted with both title and possession of property, he has, nevertheless, such interest, by reason of the obligation under his warranty to protect the title of his vendee, as enables him to maintain a bill *quia timet* to prevent or remove cloud on title. (*Post*, pp. 100-102.)

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Cases cited and approved: *Coal Creek, etc., Co. v. Ross*, 12 Lea, 1; 26 Wis., 91; 12 Minn., 276; 3 Fed. Rep., 86.

Cases cited and distinguished: *Wilcox v. Blackwell*, 99 Tenn., 352; *King v. Coleman*, 98 Tenn., 570; 110 U. S., 25; 121 U. S., 556; 18 How., 265; 155 U. S., 414; 129 Mass., 377; 54 Wis., 114.

FROM HICKMAN.

Appeal from the Chancery Court of Hickman County. W. L. GRIGSBY, J.

J. A. PITTS, M. H. MEEKS for Jones.

BATES & CLOGITT, NIXON & KNIGHT, and J. C. BRADFORD for Nixon.

CALDWELL, J. This cause comes up on bill and demurrer. For the purposes of this opinion but one branch of the case need be stated, and as to that the statement will be brief and in such form only as will be necessary to present the legal questions to be decided.

Complainant, S. G. Jones, alleges that he was the true and unquestioned owner, in fee, of 1,600 acres of land in Hickman County; that he sold that land in parcels to different persons years ago by absolute deeds with full covenants of warranty and put his vendees in possession; that they have since been, and now are, in quiet, open, notorious, and adverse possession of their respective portions of said land as unconditional owners thereof, but that, re-

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cently, by some mistake or oversight, without pleading, process, or jurisdiction in respect thereto, the said land has been sold under decree of the Chancery Court as a part of the assets of the estate of O. A. Nixon, deceased, to whom no part of it ever belonged; that the defendant, Henry Nixon, became the purchaser at that sale of the whole 1,600 acres for the small sum of \$130, and will soon have his purchase confirmed by the Court and a cloud thereby cast upon the title of complainant's vendees unless he shall be prevented therefrom by appropriate decree in this cause.

Demurrants deny that complainant shows such interest in the land as will entitle him to the relief sought. The Chancellor and the Court of Chancery Appeals, successively, overruled the demurrer, and the defendants have appealed the second time.

The bill, in its essence, is one brought by the rightful vendor of land and warrantor of its title to prevent a cloud upon the title of his vendees in possession. Can such a bill be maintained by such a person, he being without either title or possession?

In some important particulars a close kinship exists between what are known in the books as "bills of peace" and bills *quia timet*, and in others there is a wide difference between them. The points of similarity and dissimilarity will not be dwelt upon here, however, since the present bill is so plainly and exclusively of the latter kind.

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In the case of *Holland v. Challen*, Mr. Justice Miller said: "A bill *quia timet*, or to remove a cloud upon the title of real estate, differed from a bill of peace, in that it did not seek so much to put an end to vexatious litigation respecting the property as to prevent future litigation by removing existing causes of controversy as to its title. It was brought in view of anticipated wrongs and mischiefs, and the jurisdiction of the Court was invoked because the party feared injury to his rights and interests." 110 U. S., 20.

Judge Story says bills *quia timet* "are in the nature of writs of prevention to accomplish the ends of precautionary justice. They are, ordinarily, applied to prevent wrongs or anticipated mischiefs, and not merely to redress them when done. The party seeks the aid of a Court of Equity because he fears (*quia timet*) some future probable injury to his rights and interests, and not because an injury has already occurred which requires any compensation or other relief." 2 Story Eq. Jur., Sec. 826.

It is through bills of this kind, then, that clouds are removed from title to real estate. 3 Pomeroy Eq. Jur., Sec. 1398; *Holland v. Challen*, 110 U. S., 16; *Hayward v. Dimsdale*, 17 Ves., 111; *Almony v. Hicks*, 3 Head, 89; *Anderson v. Talbott*, 1 Heis., 408.

Strictly speaking, the present bill is not brought to remove a cloud from title, but it is intended, rather, to prevent the consummation of a proceed-

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ing that would, unhindered, result in obscuring that title. The difference is not one of controlling importance, however, for the jurisdiction of Courts of Equity to grant the desired relief is as well established in the one case as in the other, and the principles authorizing the prevention of clouds are generally the same as those applied in removing clouds. *Pettit v. Shepherd*, 5 Paige, 492; *Sanders v. Yonkers*, 63 N. Y., 489; *Lyon v. Alley*, 130 U. S., 177; *O'Hare v. Downing*, 130 Mass., 16; *Shattuck v. Carson*, 2 Cal., 588; *Groves v. Webber*, 72 Ill., 606; *Norton v. Beaver*, 5 Ohio, 178; *Merriman v. Polk*, 5 Heis., 717.

In the last four of those cases the bill was filed, as in this instance, to prevent the completion of a judicial sale, which, if consummated, would cast a cloud upon the title of the complainant.

The Courts have been wide apart in their opinions and decisions in relation to the character of the instruments that may be canceled in equity as clouds upon title. Some have maintained the view that such deeds, contracts, and proceedings as appear upon their face to be void in law, are not in fact clouds, and, hence, should not be interfered with by a Court of Equity, but left for judgment at law; and that equitable relief should be granted as to such instruments only as appear upon their face to be valid in law, and are shown by extrinsic evidence to be invalid. Others have thought and held that equitable relief was warranted alike in each class of cases,

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and that it should be granted with equal certainty whether the basis of the challenged claim of the adverse party was absolutely void or only voidable.

This Court is one of those that has spoken in favor of the latter view. *Jones v. Perry*, 10 Yer., 59, 83; *Almony v. Hicks*, 3 Head, 41; *Porter v. Jones*, 6 Cold., 318.

Chancellor Kent thought "the weight of authority and the reason of the thing," both, "in favor of the jurisdiction of the Court, whether the instrument is or is not void at law, or whether it be void from matter appearing on its face, or from proof taken in the cause." *Hamilton v. Cummings*, 1 Johns. Ch., 517.

Professor Pomeroy also prefers the broader view, but thinks the "majority of American decisions" against it. 3 Pom. Eq. Jur., Sec. 1399.

Likewise there has been no little contrariety of judicial opinion upon the question whether or not, to entitle him to the relief sought, the party seeking to remove or prevent a cloud on title must be in possession of the land.

A discussion of this question at this time is rendered unnecessary by the fact that this court long ago decided that possession by the complainant in such a suit was not essential to the Court's jurisdiction, and that relief would be granted him, in a proper case, though out of possession. *Johnson v. Cooper*, 2 Yer., 525; *Almony v. Hicks*, 3 Head,

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42; *Anderson v. Talbot*, 1 Heis., 410; *Bank v. Ewing*, 12 Lea, 601.

With respect to the matter of title the authorities are almost unanimous. At least it is an undoubted and well settled general rule that the party asking relief against a cloud already cast, or one that is impending, must show himself to be the true owner of the legal title before he can justly be awarded that which he seeks. If he does not own the thing obscured, or about to become so, he, generally, has no standing in Court. The object of the bill being protection of the true legal title, it is, in ordinary cases, of the essence of his right to the relief that the complainant be the owner of that title. If he be not its owner, he is, ordinarily, without a basis for the relief sought, and should be repelled. Such, beyond question, is the well established general rule. *Holland v. Challen*, 110 U. S., 25; *Frost v. Spitley*, 121 U. S., 556; *Orton v. Smith*, 18 How., 265; *Dick v. Foraker*, 155 U. S., 414, 415; *Davis v. Boston*, 129 Mass., 377; *Smith v. Sheny*, 54 Wis., 114; *King v. Coleman*, 98 Tenn., 570; *Wilcox v. Blackwell*, 99 Tenn., 352.

An exception to this rule is sometimes allowed in favor of the owner of an equitable title when his equity against the defendant is of such a nature "as to draw from him his legal title" (*Coal Creek M. & Mfg. Co. v. Ross*, 12 Lea, 1), and when he has no other adequate means of protection.

Another exception has been made, in some of the

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Courts, in favor of the vendor of land with warranty of title, his obligation to protect the title of his vendee being deemed a sufficient interest in the subject-matter to authorize his timely interposition and warrant the aid of a Court of Equity. *Ely v. Wilcox*, 26 Wis., 91; *Chamblin v. Slichter*, 12 Minn., 276; *Remer v. Mackay*, 3 Fed. Rep., 86.

This exception covers the present case exactly, and under it the bill should be sustained. Jones is bound, by the covenants of his deed, to defend and protect the title of his several vendees, and he ought to be allowed to do so, if he chooses, by an aggressive anticipatory action, rather than wait and make defense to the prospective suit or suits of him who is about to consummate proceedings that will cast a dangerous cloud upon that title. He is undoubtedly an interested party. In reality it may turn out that he, of all persons, is the one most concerned in the dissipation of the impending cloud, and, being so, a Court of Equity will not be slow to come to his relief.

Affirmed.

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BREYER v. STATE.

(*Nashville.* March 15, 1899.)

1. BARBERING ON SUNDAY. *Declared a misdemeanor.*

The Legislature has power to prohibit barbering on Sunday and to declare the same a misdemeanor and punish it as such. (*Post*, pp. 104-106.)

Cases cited and approved: *Linck v. Nashville*, 12 Lea, 499; *Parker v. State*, 16 Lea, 476; *Davis v. State*, 3 Lea, 377; *Luerhman v. Tax. Dist.*, 2 Lea, 438; *Railroad v. Hicks*, 9 Bax., 442; *Memphis v. Memphis Water Works*, 5 Heis., 495; *Hope v. Deadrick*, 8 Hum., 59; *Bell v. Bank, Peck*, 269; *Henley v. State*, 98 Tenn., 665; 163 U. S., 299; 41 L. R. A., 854; 140 Pa., 89 (S. C., 11 L. R. A., 563); 45 Ark., 347; 149 N. Y., 195 (S. C., 31 L. R. A., 689); 22 L. R. A., 721.

Cited and distinguished: *State v. Lorry*, 7 Bax., 96.

2. SAME. *Statute prohibiting not class legislation.*

A statute denouncing barbering on Sunday as a misdemeanor and imposing a heavier penalty upon that misdemeanor than is imposed by the general law upon other violations of the Sabbath is not unconstitutional as vicious class legislation. The classification, in such case, is not arbitrary and unnatural, and the statute is the law of the land. (*Post*, pp. 105-110.)

Constitution construed: Art. I., Sec. 8.

Act construed: Acts 1891, Ch. 114.

Cases cited and approved: *Vanzant v. Waddell*, 2 Yer., 270; *Stratton Claimants v. Morris Claimants*, 89 Tenn., 522; *Demoville v. Davidson County*, 87 Tenn., 218; *Henley v. State*, 98 Tenn., 698; *Railroad v. Harris*, 99 Tenn., 704.

FROM DAVIDSON.

Appeal in error from Criminal Court of Davidson County. J. M. ANDERSON, J.

NOTE.—The authorities on the constitutionality of Sunday laws are collected in a note to *Judge and v. State* (Md.), 22 L. R. A., 721.

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LYTTON TAYLOR for Breyer.

Attorney-general VAUGHN for State.

McALISTER, J. Plaintiff in error was indicted in the Criminal Court of Davidson County on a charge of carrying on the business of a barber on Sunday. By consent, the cause was submitted to Hon. J. M. Anderson, Judge, without the intervention of a jury, who, upon a consideration of the evidence, adjudged the defendant guilty.

The evidence submitted on the trial below was not preserved by bill of exceptions, and the only question made in this Court is upon the constitutionality of Ch. 114, Acts 1891. That Act is as follows: "It shall be a misdemeanor for any person to carry on the business of barbering on Sunday in Tennessee, and any person found guilty of violating this section shall be fined not less than twenty-five nor more than fifty dollars, or imprisoned in the county jail not less than fifteen nor more than thirty days, or both, in the discretion of the Court." Shannon's Code, § 3030.

The general statute against Sunday violation was passed in 1803, and was taken from the English statute of 29 Charles II., as follows: "If any merchant, artificer, tradesman, farmer, or other person shall be guilty of doing or exercising any of the common avocations of life, or of causing or permitting the same to be done by his children or servants (acts of real necessity or charity excepted) on

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Sunday, he shall, on due conviction thereof before any Justice of the Peace of the county, forfeit and pay three dollars; one-half to the person who will sue for the same, the other half for the use of the county.”

It was held by this Court in *State v. Lorry*, 7 Bax., 96, that barbering on Sunday was not indictable as a misdemeanor or as a nuisance. The Court said: “The occupation of a barber stands on the same platform with that of the merchant, mechanic, farmer, or professional man. It is an occupation necessary for the comfort and convenience of the citizens, and is in no respect a nuisance. . . . The business of barbering is so essential to the comfort and convenience of the inhabitants of a town or city that it may be regarded as a necessary occupation. To hold that it becomes a nuisance when carried on on Sunday, is a perversion of the term nuisance. All that can be said of it is that, when prosecuted on Sunday, it is a violation of the statute, and subject to be proceeded against as prescribed by law, but not subject to be indicted as a nuisance.”

It will be observed, however, that the Act of 1891 declares the business of barbering on Sunday a misdemeanor, and an indictable offense, punishable by fine and imprisonment, in the discretion of the Court.

It is insisted by counsel for plaintiff in error that a statute applicable to barbers alone is not the law of the land, but is vicious class legislation. The

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term "law of the land" is defined by our cases as a law which embraces all persons who are or may come into like situation and circumstances. *Vanzant v. Waddell*, 2 Yer., 270, 271.

Says Mr. Cooley, in his work on Const. Lim., p. 390, viz.: "Laws public in their character, and otherwise unobjectionable, may extend to all citizens or be confined to particular classes."

As stated in *Stratton Claimants v. Morris Claimants*, 89 Tenn., 522, "Citizens may be classified, under Art. I., Sec. 8, of the Constitution, when the object of the Legislature is to subject them to the burden of certain disabilities, duties, or obligations not imposed upon the community at large." The only limitation is that the statutory classification must be natural, and not arbitrary. *Demoville v. Davidson County*, 87 Tenn., 218-222; *Henley v. State*, 98 Tenn., 698; *Railroad v. Harris*, 99 Tenn., 704.

The statutes of this State, as already seen, prohibit all persons from carrying on their usual and ordinary vocations on Sunday.

Counsel for plaintiff in error cites, in support of his contention, *Eden v. People*, decided by the Supreme Court of Illinois and reported in 32 L. R. A., 659. In that case it appeared that the Legislature of Illinois had passed an Act prohibiting barbering on Sunday. There was no general law applicable to other occupations. Under the law of that State each and every citizen was left perfectly free to labor and transact business on Sunday, or refrain

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from labor and business, so long as he did not disturb the peace and good order of society. The Court said, viz.: "It is conceded in the argument that if the Legislature had enacted a law prohibiting all business on Sunday its validity would not be questioned; that such a law would violate no constitutional limitation." But because of the discrimination against the barber, the Act was adjudged class legislation. The legislation in Tennessee on this subject is wholly different. Here all persons are prohibited from carrying on business on Sunday.

It is insisted, however, that the barber is discriminated against in this: that for a violation of the Acts of 1891 he is punished by a fine of not less than \$25 nor more than \$50, or imprisonment in the county jail not less than fifteen nor more than thirty days, or both, in the discretion of the Court, while all other persons for a violation of the Act of 1803 are punishable by fine not exceeding \$3, to be recovered before a Justice of the Peace. This precise question arose in the case of *People v. Bellet*, decided by the Supreme Court of Michigan, and reported in 22 L. R. A., 697. In that case it appeared that the Legislature of Michigan passed an Act prohibiting barbering on Sunday. The constitutionality of the Act was attacked upon the ground that it was in the nature of class legislation to prohibit this business under more severe penalties than those provided for the conduct of other legitimate business on Sunday. The Court

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cited, with approval, the following from Cooley on Constitutional Limitations, to wit: "If the laws be otherwise unobjectionable, all that can be required is that they be general in their application to the class to which they apply, and they are then public in character, and of their propriety and policy the Legislature must judge." In that case the Court remarked: "It may have been the judgment of the Legislature that those engaged in the particular calling were more likely to offend against the law of the State providing for Sunday closing than those engaged in other callings. If so, it becomes a question of policy whether a more severe penalty should not be provided for engaging in that particular business on Sunday than that inflicted upon others."

It is a notorious fact that, prior to the passage of the Act of 1891, barber shops all over the State were kept open on Sunday, and the former statute was wholly ignored and disregarded. Yet it is part of the history of this legislation that it was enacted at the urgent solicitation of the barbers themselves, acting individually and collectively through their organized associations. A day of rest was needed for this most industrious and overworked trade, and it was admitted that without the imposition of heavier penalties it could not be secured, for none were willing to close their shops on Sunday unless all were made to do so. The former law was found wholly ineffective. We cannot know or state judi-

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cially what reasons controlled the Legislature in the passage of the Act, but considerations like these would constitute sound and valid reasons for this classification, and such classification would neither be arbitrary nor unreasonable.

Every sovereign State possesses within itself absolute and unlimited legislative power, except so far as it is prohibited by the fundamental law. *Davis v. State*, 3 Lea, 377; *Luehrman v. Taxing District*, 2 Lea, 438; *Knoxville & Ohio R. R. v. Hicks*, 9 Bax., 442; *Memphis v. Memphis Waterworks*, 5 Heis., 495; *Hope v. Deaderick*, 8 Hum., 9; *Bell v. Bank*, Peck, 269; *Henley v. State*, 98 Tenn., 665. The fact that the Legislature did not include other occupations in this particular statute, and the reasons for not doing so, are things which cannot be inquired into by the Courts. Cooley's Const. Lim. (5th Ed.), 222, 225. Of the policy or expediency of the law, the Legislature is the sole arbiter, and the law is valid, although a certain class (barbers) have been selected upon whom it shall operate. Cooley's Const. Lim. (6th Ed.), 153, 154. The business of a barber, while it may disturb nobody, is not a work of necessity or charity. *Phillips v. Innes*, 4 Clark & F., 234; *Com. v. Wallace*, 140 Pa., 89 (11 L. R. A., 563); *State v. Frederick*, 45 Ark., 347.

In the case of *People v. Havnor*, 149 N. Y., 195 (S. C., 31 L. R. A., 689), it was held that a statute prohibiting barbers from carrying on their trade on Sunday is a constitutional exercise of the

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police power to promote the public health. *Judefind v. State of Maryland*, 22 L. R. A., 721. In a note to this case many authorities are collected, and the learned editor sums up the subject, viz.: "These cases are only a small portion in which Sunday laws have been enforced."

It is very evident, therefore, that the judicial sanction of Sunday laws, though they have been attacked on many points, has been very nearly unanimous. That such laws are not repugnant to fundamental constitutional principles is now so universally established in every jurisdiction in which such laws have been attacked, that it would seem to be settled as fully as judicial decisions can settle anything. *Linck v. Nashville*, 12 Lea, 499; *Gunter v. State*, 1 Lea, 129; *Parker v. State*, 16 Lea, 476; *State v. Powell*, 41 L. R. A., 854; *Hennington v. State of Georgia*, 163 U. S., 299-319.

Affirmed.

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RYAN v. TERMINAL CO.

(Nashville. March 15, 1899.)

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f116	407
116	479
f116	481
116	483

 1. RAILROAD TERMINAL COMPANY. *Right of eminent domain.*

A railroad terminal corporation, chartered and organized "to facilitate the public convenience and the safety of the transmission of railroad passengers and freight, and to prevent unnecessary expense, inconvenience, and loss to the public," and authorized, for this purpose, to acquire all necessary real estate, and to lay all necessary tracks and erect all necessary buildings, is charged with a public use, and may be authorized by statute to condemn such private property as is absolutely necessary to enable it to accomplish the purposes of its organization. (*Post*, pp. 113-126.)

Act construed: Acts 1893, Ch. 11.

Cases cited and approved: *Railroad v. Cowardin*, 11 Hum., 348; *Railroad v. Tel. Co.*, 101 Tenn., 62; 153 U. S., 391; 49 Mo., 165; 47 N. Y., 150; 53 Cal., 223; 4 Ohio St., 308; 43 N. J. L., 381; 136 Mass., 75; 53 Ala., 211.

Cited and distinguished: *Harding v. Goodlett*, 3 Yer., 40; *Clack v. White*, 2 Swan, 540; *Memphis Freight Co. v. Memphis*, 4 Cold., 419.

 2. EMINENT DOMAIN. *Right of exercise, how determined.*

The declaration of the Legislature that a use is public is persuasive, but not conclusive, with the Courts. The legislative declaration in favor of the exercise of eminent domain in aid of a use that is public, is conclusive. (*Post*, pp. 116, 117.)

Cases cited and approved: *Anderson v. Turbeville*, 6 Cold., 161; 21 W. Va., 534.

 3. PUBLIC USE. *What is.*

The term "public use" is a flexible one, and not easily susceptible of exact definition. It varies and expands with the growing needs of a more complex social order. In general, a public use

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may be predicated of anything which will satisfy a reasonable public demand for public facilities for travel or transmission of intelligence or commodities, and of which the general public, under reasonable regulations, will have a definite and fixed use, independent of the will of the party in whom title is vested. But the mere fact that an enterprise will result in some convenience to the public—conferring incidental benefits upon the public by affording additional facilities for trade or manufacture—will not make the character of the use public. (*Post*, pp. 118–122.)

4. SAME. *Same. Example.*

That the charter of a railroad terminal company fixes no rates to be charged for the use of its property does not stamp it as a private enterprise. “The corporation and its property being affected by a public use will be under governmental control, and the Legislature may at any time fix rates and make more specific the duties clearly implied from the Act of incorporation.” (*Post*, pp. 124, 125.)

Cases cited and approved: 94 U. S., 113; 143 U. S., 517; 153 U. S., 391.

5. SAME. *Same.*

An enterprise is not degraded from its public character by the fact that the parties instituting it had private profit primarily in view. (*Post*, p. 125.)

6. CONSTITUTIONAL LAW. *Railroad terminal Act.*

A statute authorizing the chartering of railroad terminal corporations, stamping them with a public use, and giving them power of eminent domain, if enacted under a sufficient title for these purposes, is not rendered unconstitutional by reason of an incidental provision that such companies might maintain hotels, restaurants, and news stands in their passenger stations for the public convenience. (*Post*, pp. 125, 126.)

Act construed: Acts 1893, Ch. 11.

7. SAME. *Same. Title and subject of Act.*

A statute which, under the title “An Act to amend an Act, entitled an Act to provide for the organization of railroad terminal corporations, and to define the powers, duties, and liabilities thereof,” enacts, *inter alia*, that railroad companies contracting for use of the facilities of terminal companies, shall have power to own stock and bonds of such terminal companies,

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and to guarantee their bonds and other contracts, is not unconstitutional as grouping foreign or incongruous matters under its title. (*Post*, pp. 126-130.)

Constitution construed: Art. II., Sec. 17.

Act construed: Acts 1893, Ch. 11.

Cases cited: *Cannon v. Mathes*, 8 Heis., 504; *Luehrman v. Tax. Dist.*, 2 Lea, 426; *Merrill v. Fickle*, 3 Lea, 79; *Frazier v. Railroad*, 88 Tenn., 156; *Ex parte Griffin*, 88 Tenn., 550; *Cole Mfg. Co. v. Falls*, 90 Tenn., 469; *State v. Yardley*, 95 Tenn., 554; *Raggio v. State*, 86 Tenn., 272; *Bank v. Devine Grocery Co.*, 98 Tenn., 603.

 FROM DAVIDSON.

Appeal in error from Circuit Court of Davidson County. J. W. BONNER, J.

JAS. RYAN for Ryan.

DICKINSON & WALLER and MOORE & McNALLY for Terminal Co.

BEARD, J. This is a proceeding instituted by the Louisville & Nashville Terminal Company, a corporation chartered and organized under Ch. 11 of the Acts of the General Assembly of 1893, seeking an order of condemnation, under the laws of eminent domain, of certain real estate, the property of plaintiff in error, in the city of Nashville.

The avowed purpose of this Act was to authorize the creation of railroad terminal corporations "to facilitate the public convenience and the safety of

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the transmission of railroad passengers and freight, and to prevent unnecessary expense, inconvenience, and loss to the public.” To this end it is provided that a corporation organized under the Act had the “power to acquire, . . . at such place or places as shall be found expedient, such real estate as may be necessary on which to construct, operate, and maintain passenger stations, comprising passenger depots, office buildings, sheds, and storage yards; and freight stations, comprising freight depots, warehouses, offices and freight yards, roundhouses, and machine shops; also main and side tracks, switches, crossovers, turnouts, and other terminal railroad facilities . . . suitable in size, location, and manner of construction to perform promptly and efficiently the work of receiving, delivering, and transferring all passenger and freight traffic of railroad companies with which it may enter into contracts for the use of its terminal facilities.” The Act conferred upon the corporation, when real estate required by it could not be obtained by purchase, the power to acquire it “by condemnation, in pursuance of the general law authorizing the condemnation of private property for works of internal improvement.”

After obtaining its charter, as the record discloses, the present company entered into an important contract with the municipal authorities of Nashville, by which there was conceded to it the right to operate and extend existing railroad tracks, and

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to construct such additional tracks as it might see fit, and to construct and maintain a passenger station or stations or depots for the handling of freight, and approaches to such passenger and freight stations and depots over, under, along, and across . . . the streets, alleys, and roads of the city of Nashville, within prescribed limits, upon conditions which need not be mentioned, except that the contract was not to be operative unless the obligations assumed by the terminal company were first guaranteed by the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Company, which guarantees, the record shows, have been made.

Acting under the authority of its charter and this contract, the corporation began operations, and, in carrying out its enterprise, found, by the averments of the petition, which, not being denied, are taken to be true, that the property of the plaintiff in error was absolutely necessary in order to enable it to accomplish the purpose of its organization, and that it was situate within the limits defined by its contract with the city. Failing in its effort to purchase this property from plaintiff in error, it asked the aid of the Court in condemning the same in manner and form as the statutes prescribed.

Over the objections of plaintiff in error, made by exceptions to the reports of the jury of view, the cause progressed to a judgment of condemnation, from which an appeal, in the nature of a writ of error, has been taken to this Court.

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While the questions made in this Court could not, as a matter of proper practice, be raised on exceptions to the report of the jury of view, yet we think they arise upon the face of the petition, so that, upon this appeal, they may be considered and determined by us.

No error is assigned on the ground of irregularity of these proceedings. The objections lie deeper than this; they challenge on constitutional grounds the corporate existence of defendant in error, and, if it have a legal existence, then its right to exercise the right to condemn private property under the doctrine of eminent domain.

While there are several assignments of error to the action of the Court below we think they are reducible to these two. We will deal with these objections in the inverse order of their statement.

1. Is the use contemplated by Chapter 11 of the Acts of 1893 a public use? If so, then the defendant in error, so far as this question is concerned, is entitled on this record to the judgments of condemnation pronounced in the Circuit Court. That the Legislature regarded the use as a public use, and, by necessary implication, so declared it, is evident; this, however, is not conclusive. The necessity for and the expediency of the exercise of the right of eminent domain are questions political in their nature, and when it has been once determined by the legislative branch of the government that they exist, this determination is conclusive. Cooley

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on Con. Lim., 538; *Anderson v. Turbeville*, 6 Cold., 161. And while the Legislature must, in the first instance, pass on the use and fix its character, and while its recognition of the use as a public necessity is entitled everywhere to the benefit of strong presumptions (*West Penn. Inst. v. Edgewood R. R.*, p. 79, pr. 257; *Varner v. Martin*, 21 W. Va., 534), yet the duty is devolved on the Courts, in the last resort, of determining whether the particular use is a public use within the legal meaning of the term. Mills on Em. Dom., Sec. 10; Lewis on Em. Dom., Sec. 158; 3 Ell. on Railroads., Sec. 952.

The Constitution does not define a public use; it simply provides that no man's property shall be "taken or applied to public use . . . without just compensation being made therefor," clearly implying that it shall not be taken for a private use under any conditions. So far as we have discovered, other State Constitutions in this regard are similar to ours. The Courts have equally avoided a definition lest it prove an embarrassment in subsequent cases and work mischief in practical application. Lewis on Em. Dom., Sec. 159. They have not sought to fix a positive standard for the measurement of a public use, and, in the nature of the subject, possibly could not do so. *Paxton v. Farmers' Ins. Co.*, 29 L. R. A., 853.

However, even with this lack the subject "is not at large." It has been so long and in such a variety of cases a matter of judicial inquiry there is

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now little difficulty in assigning a particular case to its proper place and confining the right of eminent domain within natural boundaries.

／The term “public use” is a flexible one. It varies and expands with the growing needs of a more complex social order. Many improvements universally recognized as impressed with a public use were nonexistent a few years ago. The possibility of railroads was not dreamed of in a past not very remote, yet when they came the Courts, recognizing the important part they were to perform in supplying a public want, did not hesitate to take control of them as quasi-governmental agents and extend to them the right of eminent domain in order to equip them thoroughly to discharge the duties to the community which followed their grant of franchises. This is equally true as to other appliances which now form important parts of a rapidly widening system of social and commercial intercommunication. So it may be said at the present time that “anything which will satisfy a reasonable public demand for public facilities for travel or for transmission of intelligence or commodities” (~~In re Stewart~~ (Minn.), 33 L. R. A.), and of which the general public, under reasonable regulations, will have a definite and fixed use, independent of the will of the party in whom title is vested, would be a public use.／Mills on Em. Dom., Sec. 11.

A few cases taken from the many, serving to illustrate this statement, will be referred to. Grain

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elevators, found so necessary in the handling and shipment of grain, and in its transfer from the producer to the consumer (*Munn v. Illinois*, 94 U. S., —; *Brass v. N. D.*, 153 U. S., 391); passenger and freight stations (Rand on Em. Dom., Secs. 170, 184; Mills on Em. Dom., Sec. 59); railroad repair shops (*Hannibal & St. J. R. R. v. Meder*, 49 Mo., 165; *S. P. R. v. Raymond*, 53 Cal., 223); a spur track to a grain elevator and to a stock elevator (*Clark v. Blackmore*, 47 N. Y., 150; *Fisher v. C. & S. R. R.*, 104 Ill., —); a depot (*Geizey v. C. W. & Z. R. Co.*, 4 Ohio St., 308); the extension of telegraph and telephone lines intended for the public service (*Turnpike v. American News Co.*, 43 N. J. L., 381; *Pierce v. Drew*, 136 Mass., 75; *N. O. & C. R. R. v. S. & A. Tel. Co.*, 53 Ala., 211; *Mobile & O. R. R. v. P. Tel., etc., Co.*, 17 Pick., 62, S. C., 46 S. W. R., 571), have been held the subjects of public use.

Upon the authority of these cases, and many others of a similar character which might be referred to, we have no doubt the trial Judge was right in holding the enterprise in question was impressed with a public use, unless it be, as is insisted by plaintiff in error, our own cases have laid down a different rule, which, under the doctrine of *stare decisis*, we should adhere to.

We will now examine the cases relied on to sustain this assignment of error. The first of these is that of *Harding v. Goodlett*, 3 Yer., 40, in which it

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was sought to condemn land for the erection of a grist mill, a sawmill, and a paper mill. In disposing of the case, this Court said that, under the cover of a statute which made a grist mill a public mill, the property of a private citizen could not be taken, against his will, for a joint undertaking, when two of its parts, to wit, the sawmill and paper mill, were purely individual enterprises, with which the public had no concern. This was the extent of the holding in that case.

In *Clack v. White*, 2 Swan, 540, the Court simply held Ch. 60 of the Acts of 1811, which conferred upon the County Court the power to grant a private road, where the lands of one person were surrounded by the lands of another, was unconstitutional and void, in that it sought to take the property of one citizen and apply it to the private advantage of another citizen.

It is clear to us that these cases give no support to the contention of plaintiff in error, but only announce the uniformly accepted principle that in the face of this constitutional provision one man's property cannot be taken under the forms of law and given to another.

The case, however, most relied on as establishing a rule peculiar to this State is that of the *Memphis Freight Co. v. Memphis*, 4 Cold., 419. The Act incorporating the Memphis Freight Company is found in §§ 13, 14, and 16 of Chapter 79 of the Acts of 1865-66. By Section 16 it was

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provided "that said corporation is hereby given the privileges of loading and unloading freights . . . on or from steamboats and other water craft that may touch at the port of Memphis, Tennessee, and, for the purpose of carrying on said business, said corporation is granted the right . . . to erect upon the summit of the east bank of the Mississippi river, in the city of Memphis, and between Poplar street and Beal street, such sheds, railroad tracks, . . . as may be necessary for the business of handling freights. Said corporation shall also have the right to lay down such railroad tracks, from their sheds above referred to, to the margin of the Mississippi River, upon which to operate their cars."

We think a cursory reading of this section defining the purpose of the corporation and fixing the limits of its powers is sufficient to characterize this enterprise as exclusively private, lacking all color or pretense of public utility. The Legislature evidently so regarded it, for it conferred no power of condemnation in its charter. This power was claimed by the company under § 1325 of the Code of 1858 (§ 1844, Shannon's Code), which provides that "any person or corporation authorized by law to construct any railroad . . . may take real estate," etc.

The railway tracks which the company was empowered to construct were the mere incidents of its business of handling and warehousing steamboat or barge freight. They were only to serve the con-

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venience of the company. In them the public would not have a shadow of interest, over them not a pound of freight could be moved or one individual pass, save with the consent of the corporation or at its instance. The insistence, therefore, in that case that the authority to lay down such tracks entitled the corporation to the benefit of a statutory provision which was passed to encourage the development of a great internal improvement system in this State, including commercial railroads, was to make a mockery of the legislative intent. Hence it is not remarkable that this Court, finding the enterprise a private one, of extremely limited extent, rejected this claim as unwarranted either by public policy or any sound rule of statutory construction.

But that case established no new or unique rule in this State as is now argued. While this is true, we entirely agree with the counsel for plaintiff in error that the fact that an enterprise will result in some convenience to the public—conferring incidental benefits upon the public by affording additional facilities for trade or manufacture—will not make the character of the use public. To this extent the argument of the opinion supports their contention, but no further. We agree the proposed improvement must go beyond that. It must in some way enlarge the resources, increase the industrial energies, promote the productive power of, or afford increased facilities for, the rapid exchange of thought or trade, or otherwise answer the growing needs of the com-

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munity as such, before the use becomes public, and the agency controlling passes under governmental control. This proposition is in no way antagonized by that opinion.

After a careful examination of these authorities, we fail to find in them any principle settled or rule announced that constrains this Court to place itself out of line with the well considered cases coming from Courts of great eminence, some of which have been referred to.

On the other hand, we think the case of the *N. & C. R. R. v. Cowardin*, 11 Hum., 348, furnished strong support to the judgment of the Court below. By its charter there was conferred expressly upon the Nashville & Chattanooga Railway power to appropriate, by process of condemnation, the lands of private owners for a roadbed or right of way. In that case an effort was made to condemn land for a depot, and the owner resisted upon the ground that the right of eminent domain was, by its charter, confined to roadway purposes, and that lands for a depot could be secured in no other way than by purchase. This was held to be unsound. In disposing of the contention, this Court said, to effectuate the purpose contemplated by its charter—that is, “the transportation or conveyance of persons, goods, merchandise, and produce over” the road, there must be a place of receiving and delivering the freight carried, or to be carried, over it, and that land upon which to establish this place was as

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essential as the bed of the road, and, in fact, constituted a part of the road. It was therefore held entitled to condemn land sufficient for a depot.

If it be true, then, that a depot erected by the Nashville & Chattanooga Road was a public use, why should a union depot, laid out and constructed for the accommodation of all the roads now concentrated at Nashville, where, for greater convenience, all travel and freight will be gathered, and to be used by these roads for no other purpose than this railroad would use its own depot, be any the less a public use? The rapid growth of population, the yearly increase in volume and value of commercial interests, the pressing necessity for the speedy handling, delivery, and transmission of freight to prevent accumulations and often ruinous delays, the vast economy of time and money to shippers and the traveling community in the matter of transfers, are among the considerations which have multiplied these depots in cities where railroads centralize, and we are satisfied no improvement in railway intercommunication more nearly touches the public than this. *Fort Street Union Depot Co. v. Morton*, 83 Mich., 265.

But it is said this is a private enterprise, because the Act on which the charter rests fixes no rates to be charged by the corporation for the use of its tracks, etc. This is immaterial. The corporation and its property being affected by a public use will be under governmental control, and the Legislature may

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at any time fix rates and make more specific the duties clearly implied from the Act of incorporation. *Munn v. Illinois*, 94 U. S., 113; *Budd v. New York*, 143 U. S., 517. *Brass v. North Dakota*, 153 U. S., 391.

Again, it is argued that this is essentially a private undertaking, because the Act shows that it is set on foot for profit to the corporators. This also is immaterial. The authorities concur in holding that an enterprise organized to meet a public demand is not reduced in its character because the parties instituting it have primarily in view private profit. Notwithstanding this it is still impressed with a public use. Mills on Em. Dom., Sec. 13; Rand on Em. Dom., Sec. 54; Lewis on Em. Dom., Sec. 75.

It follows that the assignments of error to the action of the trial Judge in holding this to be a public use must be overruled.

2. We will now consider the constitutional objections urged to this Act.

It is insisted, in the first place, it is unconstitutional because it provides that a terminal corporation may keep at its passenger station a hotel or restaurant, or both, and also a news stand, thus converting the use which might otherwise be a public use into a private use. This objection is not well taken. By its terms the corporation is organized for terminal purposes only. The power of acquiring real estate by purchase or by condemnation is confined to these purposes. Among these, neither

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expressly nor by implication, is included that of keeping a hotel, restaurant or news stand. It is only where such a corporation has acquired property to serve the objects of its creation that, in the construction of its passenger station, if it deems best, it may exercise the purely incidental right to provide these accommodations for the public. This neither renders the Act unconstitutional nor converts the undertaking into a mere private enterprise.

It is next insisted the Act in question is obnoxious to that part of Section 17 of Article 2 of the Constitution, which provides: "No bill shall become a law which embraces more than one subject, that subject to be expressed in the title." This clause appears for the first time in the Constitution of 1870, and in 1872 it underwent a critical examination in *Cannon v. Mathes*, 8 Heis., 504. In the opinion in that case an extensive quotation is made from Judge Cooley's work on Constitutional Limitations, and there was expressed entire concurrence with the views of the author. This quotation is as follows: "The general purpose of these provisions is accomplished when a law has but one general object, which is fairly indicated by its title. To require every end and means necessary or convenient for the accomplishment of this general object to be provided for by a separate Act relating to that alone would not only be unreasonable, but would actually render legislation impossible . . . The generality of a title is no objection to it so long as it is not

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made a cover to legislation incongruous in itself, and which, by no fair intendment, can be considered as having a necessary or proper connection." This rule was applied in determining the validity of the Act, the subject of attack in that case. That was an Act to raise revenue for the State and was entitled "An Act to fix the State tax on property," but, by one of its provisions, increased largely the tax on privileges. The constitutional attack was made in regard to this last provision as being outside and beyond the title. But on the authority of Judge Cooley's text it was held that there was no incongruity in this legislation, and it was announced "that the true rule of construction as fully established by the authorities is, that any provision of the Act directly or indirectly relating to the subject expressed in the title and having a natural connection therewith, and not foreign thereto, should be held to be embraced in it." This case has since been frequently cited and approved by this Court. *Luehrman v. Taxing District*, 2 Lea, 426; *Merrill v. Fickle*, 3 Lea, 79; *Frazier v. Railroad*, 4 Pick., 156; *Ex parte Griffin*, 4 Pick., 550; *Cole Manufacturing Co. v. Falls*, 6 Pick., 469; *State v. Yardley*, 11 Pick., 554.

Measured by this rule, does the caption or title of this Act cover incongruous legislation? This caption is as follows: "An Act to amend an Act entitled an Act to provide for the organization of rail-

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road terminal corporations, and to define the powers, duties, and liabilities thereof.”

The provisions in the Act which it is urged violate the clause of the Constitution in question are found in the third section, and are those which empower railroad companies, which enter into contracts with a terminal company, to guarantee the principal and interest of bonds issued by such company, as well as other contracts made by it in regard to its corporate business, and also to subscribe for, hold, and dispose of the capital stock or bonds which may be issued by the terminal corporation.

The title gives clear notice to the Legislature and the public that the object of the Act is to provide for the organization of railroad terminal corporations, which shall be clothed with powers necessary to effectuate the purpose of their creation. There could be no mistake, even at a glance, that a company so organized was designed to, and, from the nature of the case, must, be identified with the operation of railroads having terminal points at the place where such corporation is instituted. Without this a terminal company would have no excuse for existence, and, if organized, would serve only as a monument to the folly of its corporators. As might be anticipated, from the reading of the title, the body of the Act manifests the intimate relation which was contemplated between these terminal companies and such railroads.

The plan thus devised for the increased accom-

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modation of the public could not, as might well be assumed, be accomplished without the raising and expenditure of large sums of money. The Legislature recognized this and therefore authorized the company which organized under the Act to borrow money as its necessities required, and to that end to issue its bonds secured by mortgage on its property. But realizing, even when so secured, these bonds might not find ready sale, and desiring, in view of the possible magnitude and the certain importance of the enterprise, to give the highest credit to these corporate securities in the money markets of the world, the Act empowered the railroads interested in it to add the weight of their guaranty to them, and also to give aid by subscribing to and holding shares of its capital stock and bonds.

What was more natural than such a corporation, created to give increased facilities to these railroads, should look to them for aid in such an undertaking and that these roads should be willing to furnish this aid. It was in view of this condition of mutual interest and interdependence these provisions were embodied in the Act.

In support of their contention the learned counsel for plaintiff in error have pressed upon us a number of cases, including *Ragio v. State*, 2 Pick., 272, and *Bank v. Divine Grocery Co.*, 13 Pick., 603. All of these cases have been carefully examined and we are unable to find in them anything to shake our confidence in the conclusion we have reached.

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Each one has features peculiar to itself that were controlling in its determination. No one of them, adopting the language used in *Frazier v. Railway Co.*, “contain any rule or principle for the construction of the constitutional clause in question in any way antagonistic to the well settled doctrine heretofore frequently announced by this Court.”

In addition to what was said in the *Frazier* case may well be repeated here, “The subjects of legislation are infinite. The determination as to whether the several provisions of an Act are congruous and germane becomes largely a question of fact. Particular decisions cannot often be controlling in determination of subsequent cases arising out of this constitutional provision.” As each case is presented the Courts are bound to examine the Act in question as a whole, and applying to it the sound rule of construction announced in *Cannon v. Mathes, supra*, and their “own knowledge of affairs” (*Frazier v. Railway Co., supra*) determine whether its provisions are congruous or not.

After a careful review of the case at bar, we are satisfied with the conclusion reached in the Court below. The judgment is therefore affirmed.

 McKinney v. Nashville.

McKINNEY v. NASHVILLE.

(Nashville. March 16, 1899.)

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f117	232

1. MEASURE OF DAMAGES. *For property taken for public use.*

In estimating the value of property taken for a public use, the fair market value is the one to be ascertained. In ascertaining this value, all the capabilities of the property and all the legitimate uses of which it is susceptible should be taken into consideration. The particular use for which the property is most valuable or to which it is at the time adapted and applied, though proper matters for consideration, is not controlling as to this value. (*Post*, pp. 132-138.)

Cases cited and approved: *Woodfolk v. Railroad*, 2 Swan, 437; *Alloway v. Nashville*, 88 Tenn., 510; 58 Mo., 491.

2. SAME. *Same.*

If, in a proceeding to condemn property for public use, it is shown that its rental value has been inflated by an unlawful use of the property—*e. g.*, for gaming purposes—the jury should be instructed to discard rental value, to the extent of the inflation, as evidence of value of the property. (*Post*, pp. 138-140.)

 FROM DAVIDSON.

Appeal in error from the Circuit Court of Davidson County. J. W. BONNER, J.

E. H. EAST, for McKinney.

PRICE & McCONNICO, for city.

BEARD, J. This is a condemnation proceeding instituted by the municipal authorities of Nashville.

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The right to condemn the property in question is conceded by its owner, the plaintiff in error; the controversy is as to the rule for ascertaining value submitted by the trial Judge. In his charge to the jury he said: "In considering the uses for which the property was adapted, you must consider all legitimate purposes for which it may be used and must not confine yourselves to any one special or particular use as going to indicate its value." And again: "You will consider its location and publicity, its situation with reference to the Public Square and Deaderick street, and its vicinity to other property used for business or other purposes. You will also consider the adaptability of the property to any and all legitimate purposes to which it might be applied and its rental value for any and all such legitimate purposes, as well as other elements of value developed by the proof" in fixing the compensation to which the owner of the property was entitled upon its appropriation to a public use.

The record disclosed that this property was more valuable, by reason of location, for saloon purposes than any other, and that at the time of the institution of the present proceedings it was under lease for a term of five years for a good annual rental, and was then used to carry on a saloon business. In view of this condition, the contention of plaintiff in error is best stated in the words of his counsel, taken from his brief and argument, which are as follows: "If a saloon keeper, because of the location

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of property, its adaptability to his intended uses, will give more for it than another whose occupation is different can afford or will give, looking to his intended use for it, why should the owner not receive the highest value which anyone would give for the property? I do not mean this highest value for one use should be considered in connection with its value for other uses in order to diminish its value, but that it constitutes its value—is its value in the market.” And again: “Instead of saying to the jury you must consider all legitimate purposes for which it might be used, he should either have said to the jury the owner has a right to its value for the use for which it would bring the most in the market, or that they should value the property on the basis of its most valuable use.”

These paragraphs, taken from the instructions of the trial Judge and the argument of the counsel criticizing them, present sharply the issue on this point which is presented for our determination. On this issue we do not hesitate to approve the charge of the trial Judge.

Lewis, in his work on Eminent Domain, Sec. 478, says: “In estimating the value of property taken for public use, it is the market value of the property which is to be considered. The market value of property is the price which it will bring when it is offered for sale by one who desires but is not obliged to sell it and is bought by one who is under no necessity of having it. In estimating its

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value all the capabilities of the property and all the uses to which it may be applied or for which it is adapted are to be considered, and not ~~merely~~ the condition it is in at the time and the use to which it is applied by the owner." To this text many cases are cited by the author. One of these cases is *Mississippi Bridge Co. v. Ring*, 58 Mo., 491, in which the Court say: "The correct rule to be applied relates to the value of the land to be appropriated, which is to be assessed with reference to what it is worth for sale in view of the uses to which it may be put, and not simply in reference to its productiveness to the owner in the condition in which he has seen fit to have it."

Nor do we find the authorities relied upon by plaintiff in error to support his contention out of line with the rule thus announced, with one possible exception. We will now examine these authorities.

In *Chicago, etc., R. R. Co. v. Jacobs*, 110 Ill., 414, the trial Court had said to the jury, as is insisted should have been done in this case, "that the owner of property to be condemned is entitled to its actual value for its highest or best use to which the property could be put, and in case" it "has an actual value for a specified use, and that such property is devoted and adapted to such use, then the owner is entitled to such value." On appeal this was held to be error, and the Supreme Court said: "The jury should have been instructed in such a way that they would look to the market value

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of the property. But the instruction opens up a wider field of investigation. It was a fair invitation to the jury to enter into another field of inquiry as to the value of the lots—to ignore the market value and determine the actual value for a specified use.” The case was, therefore, reversed for this error of the trial Judge.

We think this statement of that case shows it to be in the face of the insistence of plaintiff in error and places it in line with the text of Mr. Lewis.

The case of *Gardner v. Inhabitants of Brookline*, 127 Mass., 358, so far as we can see, does not shed any light on this question; but the case of *Johnson v. F. & M. Ry. Co.*, 111 Ill., 414, seems to furnish authority for the contention of plaintiff in error. In that case, upon the trial below, the Court had excluded evidence offered by the owner of the property which it was sought to have condemned, that it had a special value for railroad purposes—and it was for these purposes condemnation was sought—beyond its general market value. The Supreme Court held this ruling to be error, and say: “If property has a special value, from whatever cause, that value belongs to the owner, and he is entitled to be paid for it by the party seeking compensation.”

The opinion in this case was delivered at the November term, 1884, by the Court composed of the same Judges which announced the opinion in the case of *Chicago, etc., R. R. v. Jacobs, supra*,

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at the immediately preceding spring term. It is hardly to be supposed this latter case was overlooked, and yet it is not mentioned in that opinion. Nor do we believe it was intended to overrule it *sub silentio*, and establish a new general rule. On the contrary, we are satisfied, from the description of the property found in the opinion, that it was a strip of ground valuable largely, if not exclusively, for railroad purposes, and therefore without any general market value, and that the Court simply intended to protect this exceptional property to the owner by applying a measure of compensation which gave to the owner the full equivalent of this exceptional use. If this be the interpretation, then it is in harmony with a number of other cases, and it does not conflict with the general rule as to market value.

Plaintiff in error relies also upon the statement of Mr. Randolph, in his law of Eminent Domain, that "the property must be valued at its most profitable use." Sec. 249. To this text the author cites alone the case of *Goodin v. Cin., etc., & W. Canal Co.*, 18 Ohio St., 169. The opinion in that case does not support the author's text, at least as it is interpreted by the plaintiff in error. The Court say there: "The true value of anything is what it is worth when applied to its natural and legitimate uses—its best and most valuable uses. The estimate should have been of its value generally for any and all uses, and not for any partic-

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ular, and especially not for any inferior or inappropriate use." Thus stated, we see no divergence from the rule as stated by Mr. Lewis.

Plaintiff in error also relies on a statement taken from the text of Mills on Eminent Domain, p. 168, to the effect that "the owner has a right to its [property's] value for the use for which it would bring the most in the market." While this is embodied in the text, yet it is taken literally from the opinion in *King v. Minneapolis Co.*, 32 Minn., 224, the case which the author cites in support.

In that case the property sought for condemnation had upon it a manufacturing establishment which was in operation, and the error alleged was that the trial Court had improperly let in evidence of that fact. The Court held that this was not error, and say that the owner "is entitled to the value of his property for any use to which it may be applied and for which it would ordinarily sell in the market. It is, we think, equally true that any evidence is competent and any fact is proper to be considered which legitimately bears upon the question of the marketable value of the property. In this case evidence was introduced tending to prove that the fact of a business having been established and carried on on the premises for so long a time, materially increased the market value of the property." It is in this connection the sentence already quoted occurred, and the Court further along, as well as in the paragraph just given, show clearly

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that their only meaning in the use of this sentence is that evidence of this special valuable use is competent to go to the jury, in order to enable them to estimate the fair market value of the property. This case is clearly in line with the rule as heretofore taken from Lewis on Eminent Domain.

We have devoted this much time to the examination of the authorities relied on by the counsel for the plaintiff in error, out of deference for the ability and earnestness with which they have been pressed upon us, notwithstanding the fact that the rule has been established in this State against the contention of plaintiff in error, at least since the case of *Woodfolk v. N. & C. R. R.*, 2 Swan, 437, and was reannounced in *Alloway v. Nashville*, 88 Tenn., 510, in which latter case, in adopting the language of the trial Judge in his instruction to the jury, it was said by the Court that, in cases like the present, "the cash market value of the land" is the measure of compensation.

In addition to the constraining authority of *stare decisis*, the rule commends itself as an eminently just one; and, as the trial Judge gave the plaintiff in error the full benefit of it in the admission of testimony and in his charge to the jury, the assignment of error on this point is overruled.

In the progress of the trial of the case, evidence was permitted to go to the jury that tended to show that gambling was frequently, if not habitually, carried on in one or more of the rooms of

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the property, and that this fact inflated the rental value of the property. In regard to this, the trial Judge said to the jury if they found that gaming was carried on there, and that it did inflate the rental value, then, to the extent of such inflation, the rent received cannot be considered as indicating either the rental or the market value.⁹ We think there is no error in this. Gambling is an offense against the law, and the use of any portion of this property for gambling purposes was in violation of the law. And if it was true that such illegitimate use did inflate the rental value of this property, then the jury were properly told that a rent inflated by this use, to the extent of the inflation, could not be taken into consideration as constituting a part of the rental value. It is true that it might be a matter of difficulty to determine where the rental value from a legitimate use ended and that from the illegitimate use began, yet that is the misfortune of the owner, for which the city is not responsible.

In this case, however, we think that there is sufficient evidence to guide the jury, at least approximately, in determining the value of this inflation. It is true it is found largely in the opinion of witnesses, which is necessarily somewhat speculative, but not more so than is ordinarily found as to questions of value.

We are satisfied, in examining this record, that, taking into consideration all the elements that make

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up market value—the eligibility of the location of the lot, its front and depth, its rental income, and especially the old and dilapidated condition of the house on the lot—that the jury fixed a valuation of this property which affords just compensation to the plaintiff in error.

The judgment is affirmed.

Fitts v. State.

FITTS v. STATE.

(Nashville. March 16, 1899.)

1. CRIMINAL PRACTICE. *Effect of void verdict.*

A verdict fixing a punishment in excess of the maximum prescribed by statute, and for that reason set aside as a nullity, cannot be successfully interposed to prevent another trial and further prosecution of the case. (*Post*, pp. 142, 143.)

Cases cited and approved: *Ragsdale v. State*, 10 Lea, 671; *Murphy v. State*, 7 Cold., 516.

2. EVIDENCE. *Of defendant's statements after homicide admissible, when.*

Declarations by defendant twenty or thirty minutes after the homicide, warning the witness not to go to his store, at which was located a telephone, affording the only method of communicating with the county seat, informing him that he must be careful what he testified to, and deriding the wife and daughter of deceased, who came along crying and moaning, are admissible against him, as tending to show an effort to suppress evidence, intimidate a witness, and to cut off communication with the county seat, and also for the purpose of showing malice. (*Post*, pp. 146, 147.)

FROM SUMNER.

Appeal in error from Criminal Court of Sumner County. A. H. MUNFORD, J.

Fitts v. State.

J. J. TURNER for Fitts.

Attorney-general PICKLE and W. C. DISMUKES for State.

McALISTER, J. The plaintiff in error, Sam Fitts, was convicted by a jury in the Circuit Court of Sumner County of the murder of one John Perry, and sentenced to the State prison for a term of fifteen years. The prisoner has appealed in error.

It appears from the record that on a former trial the prisoner was convicted of murder in the second degree, and his term of imprisonment fixed at twenty-one years in the penitentiary. The maximum punishment for murder in the second degree being fixed by statute at twenty years imprisonment, the verdict of the jury fixing the punishment at twenty-one years was a nullity, and a new trial was therefore granted.

It is conceded that the jury was led into the error by an inadvertence on the part of the trial Judge in defining the punishment for murder in the second degree. Counsel for the prisoner then interposed a plea of *autre fois convict*, relying upon the former prosecution and verdict in bar of a second trial. On motion of the District Attorney this plea was stricken from the files, to which action of the Court counsel for the prisoner excepted.

The former verdict was unwarranted, and, being a nullity, no valid judgment could be pronounced upon it. It was therefore no bar to a second pros-

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ecution. *Ragsdale v. State*, 10 Lea; *Murphy v. State*, 7 Cold.

The killing occurred in the village of Westmoreland, in Sumner County, on Christmas day, 1897. The prisoner lived about a mile from the village. He testified that on the morning of that day he had been informed that his nephew, one Charles Tyree, had been assaulted in Westmoreland by the Perrys, and that he was advised to go there and look after him; that he immediately repaired to the village, where he found his nephew engaged in a fight, and that when he endeavored to take his nephew out of town, he was assaulted with a stick by one Bob Aiken, a friend and relative of the Perrys.

The prisoner states that he repelled this assault, and took his nephew home. Prisoner further testified that during the afternoon of the same day, while at home, he was notified that his brother, Matt Fitts, was about to be killed in the village, and that he had better go and look after him. On reaching the village he claims to have found his brother in a fight with the Perrys, and that one of the Perrys was after him with a brick. Defendant claims that he started to take his brother home, and when near the depot he met Sam Perry, a son of John Perry, the deceased, with a double-barreled shotgun, who inquired of defendant what he was doing there. Defendant replied that he was taking his brother home. Thereupon Sam Perry passed

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into the sitting room of the depot, and, as he did so, his father, John Perry, the deceased, walked rapidly out of the door towards the defendant and rolled up his sleeves. Defendant said: "Don't come any further, don't hit me!" But at that moment deceased drew a knife, and still advanced towards him. Defendant states that he backed across the platform of the depot and against the train that had just passed into the depot. The deceased, says the defendant, still advanced towards him, and when within three or four feet raised his hand to strike him with his knife, and thereupon the prisoner says he drew his pistol and shot deceased. This is the substance of defendant's testimony, and, if it is to be credited, it makes out a case of self-defense in the fullest and most technical sense. But, unfortunately for the defendant, he is not corroborated in his account of the tragedy by a single witness. On the contrary, nine witnesses introduced by the State make out a case of the most unprovoked and unjustifiable homicide.

According to these witnesses, about four o'clock in the afternoon of Christmas day, Matt Fitts, a brother of the prisoner, and the Aiken boys became involved in a difficulty, but John Perry, the deceased, had no connection with it whatever.

The prisoner, Sam Fitts, was first seen coming down the railroad, and, meeting Bob Aiken, cursed him, and asked him "what he had to do with it." Aiken replied, "I have nothing to do with it,"

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whereupon Fitts snapped his pistol at him, and Aiken ran. Defendant next accosted West Perry, addressing the same remark to him, and, receiving the same response, pushed Perry out of the way, cursing him. Defendant then started towards the depot, when he met Sam Perry with a double-barreled shotgun. Defendant asked, with an oath, "What have you got to do with it?" and "What are you doing with that gun?" Sam Perry replied, "I have nothing to do with it, Uncle Sam, and the gun is not loaded," and showed defendant the gun was unloaded. Sam Perry turned and walked back to the depot, and, going in, shut the door behind him. About this time, John Perry, the deceased, came out of the depot, and defendant immediately accosted him with the query, "What in the hell have you got to do with it, you son of a bitch?" and, addressing his brother, Matt, who had a stick in his hand, said, "Hit him, God damn him!" John Perry remarked, "I had nothing to do with it, and don't you call me a son of a bitch," at same time raising his hand. Defendant said, "You are a damned liar," pulled his pistol, and, holding it in his hands, shot John Perry in the breast, killing him almost instantly. The witnesses for the State testify that deceased had nothing in his hands at the time he was shot, and made no attempt to strike defendant. Five or six witnesses swear to this fact. Another witness for the State testifies that when defendant asked deceased what he had to do with it,

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he replied, "I had nothing to do with it; I am for peace." These facts amply support a conviction for murder in the second degree.

Error is assigned upon the action of the trial Judge in not excluding the testimony of the witness, C. A. Whiteside. This witness testified that about twenty or thirty minutes after the killing he had started home with his wife; that defendant followed them into the house of witness, and said, viz.: "I have had it in my mind to kill you for some time, and if you take any interest in Perry I will kill you." Defendant warned witness to stay in his house, and not go to his store, where the telephone was located, the only method of communicating with Gallatin. "Defendant also said I must be mighty particular what I testified, 'that he was a bad man, and expected to be sent up six or seven years for killing old man Perry, and when he got out he would settle with me.' About this time the wife and daughter of deceased came along crying and moaning. Defendant saw and heard them, and said, 'Go on moaning, God damn you! I have killed old John Perry, and I intend to kill Sam Perry, too.' "

It is earnestly insisted by learned counsel that these alleged statements, made by the prisoner twenty or thirty minutes after the killing, are clearly incompetent. We do not think so. They are plainly admissible to show an effort on the part of prisoner to suppress evidence and to intimidate a witness, as

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well as to cut off communication with Gallatin, the county seat. They are also competent as illustrating the malice of defendant.

Several requests were submitted on behalf of the prisoner, which were refused by the Circuit Judge. We find no error in the action of the Court, and the judgment is affirmed.

Moore v. Moore.

MOORE v. MOORE.

(*Nashville.* March 16, 1899.)

1. EVIDENCE. *Of marriage.*

No presumption of marriage arises from conduct otherwise affording plenary proof of marriage, when one of the parties is shown to have been obligated at the time by a prior legal and subsisting marriage. (*Post*, pp. 150-154.)

Cases cited: *Allen v. McCullough*, 2 Heis., 185; 48 Md., 391.

2. HUSBAND AND WIFE. *Divorce for illegal second marriage.*

The provisions of Shannon's Code, § 4201. subsec. 2, that if either party has knowingly entered into a second marriage in violation of a previous marriage still subsisting, "this shall be a sufficient cause for divorce from the bonds of matrimony," are intended for the relief of one who has innocently entered into an apparent second marriage rather than for the protection of the other spouse of the existing marriage, since the latter is adequately protected by subsec. 3, making adultery a ground of divorce. (*Post*, pp. 154-156.)

Code construed: § 4201, subsecs. 2, 3 (S.); § 3306, subsecs. 2, 3 (M. & V.); § 2448, subsecs. 2, 3 (T. & S.).

Cases cited and approved: 5 Ohio St., 32.

Cited and disapproved: 15 Pa., 597.

3. SAME. *Adulterer denied divorce.*

A husband cannot obtain a divorce on the ground of adultery where the record convicts him of a violation of his own marriage vows. (*Post*, p. 156.)

Code construed: § 4213 (S.); § 3318 (M. & V.); § 2460 (T. & S.).

FROM ROBERTSON.

Appeal from Circuit Court of Robertson County.
A. H. MUNFORD, J.

Moore v. Moore.

RUHM & SON, A. E. GARNER, A. J. CALDWELL,
and H. C. CARTER for Complainant.

L. T. COBBS and FURLONG, WHITE & O'CONNELL
for Defendant.

BEARD, J. This bill was filed by the complainant asking a decree of divorce from the defendant, his wife, upon two grounds, first, that she had committed adultery, and, second, that she had contracted a second marriage with one Frank Edwards, knowing at the time that her previous marriage with complainant was valid and subsisting.

The wife answered this bill, and, with other averments, stated that she had been abandoned by complainant when in an *enceinte* condition, resulting from her short association with him as his wife, and that after this, and when sick, penniless, and in the midst of strangers, her co-respondent, Edwards, befriended her, and that for several years thereafter they had lived together and she had borne him children; but she denied that she had contracted marriage with him, averring that their relations had always been meretricious.

In a cross bill filed by her she charged complainant with adultery, with abandonment, and a failure to support, and asked a decree of divorce from him as well as for alimony.

Upon the trial of the case, the Court below, declining to pass on the question of adultery upon the part of the defendant, granted to complainant a di-

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vorce upon the ground that the defendant had knowingly entered into a second marriage after her marriage with complainant, and dismissed the cross bill of defendant. From this decree Mrs. Moore has appealed.

It is unnecessary for us to go into the details of the evidence found in the large record. In the view we have taken of the case it is sufficient to summarize it.

The complainant, while attending, as a student, a medical school in Nashville, became acquainted with the defendant, and, according to the testimony of Mrs. Moore, this acquaintance soon ripened into an engagement to marry at an indefinite day in the future. After a time complainant went to New York for the purpose of finishing, in one of the schools of that city, his professional studies. While there the defendant, who, in the meantime, had removed to Chicago, joined him, as she alleges, upon his earnest invitation, but, as he states, without suggestion from him and most unexpectedly, when, after a hasty interview, they were married. This marriage is characterized by complainant in his bill as a piece of youthful folly on his part.

He admits, however, that though he parted company with the defendant immediately after the marriage took place, yet he joined her in Chicago a few months subsequently, and there, for several days, cohabited with her at her father's home, as his wife, and then, separating from her once

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more, he joined her again in Chattanooga, where she had found employment, and there resumed marital relations, living with and openly claiming her as his wife. This lasted, however, but a little while, when he finally abandoned her, as we are satisfied this record clearly indicates, *enceinte* as the result of this last cohabitation.

As to the story of her own life from that time forward the defendant seems to make no concealment, but offers in extenuation for it the extreme suffering to which she avers she was soon reduced by the abandonment of her husband at a time when she most needed his aid and comfort. She states in her deposition, as she had already done in her answer, that she was left without means by him, and that in a little while her physical condition rendered her helpless, and while thus situated in a strange land, she attracted the notice and sympathy of Edwards, who obtained a home for her, and with his means aided her through her period of confinement. Out of this, she confesses, there grew gratitude, affection on her part, followed by an illicit relation between herself and Edwards, which extended over a period of several years. During this relationship at least two children were born to these parties.

The record clearly shows that the defendant and Edwards traveled widely, and were domesticated at several places, and always claimed and were understood to be husband and wife. At the hotels they so registered themselves, and at a lying-in hospital

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in the city of Philadelphia where, in anticipation of the prospective birth of one of their children, Edwards desired she should gain admission in order that she might receive such attention as her condition required, both of these parties assured the matron in charge that they were married, and made exhibit of a paper which they said was a marriage certificate, it being necessary to admission that the woman should be married. While admitting all these things to be true, yet she and Edwards, in their depositions deny with great emphasis that they were ever married.

No proof of an actual marriage between them was attempted. The fact that such a marriage had taken place was rested alone upon the presumption of marriage arising from the facts just stated. It is true, as has been heretofore set out, that these two parties did state, when seeking admission for Mrs. Moore to the hospital in Philadelphia, that they were married, and much emphasis is laid on this statement, but, as is said by the Lord Chancellor in *Cunnigam v. Cunnigam*, 2 Dow, the value of such statements depends on the circumstances under which they were made, and we attach, in view of the purpose and surroundings of these parties no more importance to this claim of theirs than to the fact that during the continuance of their relationship they uniformly held themselves out to the world as man and wife. And there is no doubt, if there had been no proof of the previous legal marriage of complainant and the defendant, that, as an independ-

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ent fact, the evidence adduced in this cause would be ample upon which to rest a presumption of marriage between Mrs. Moore and Edwards. But will such evidence be sufficient where there is existing all the time a previous legal marriage?

We think certainly not.. Mr. Bishop, in his work on Marriage, Divorce and Separation, Vol. 1, Sec. 956, very clearly states the principle on which the presumption of marriage from such facts rests, in these words: "Every intendment of the law leans to matrimony, . . . it being for the highest good of the parties, of the children, and of the community, that all intercourse between the sexes in form matrimonial should be such in fact. The law seizes upon all probabilities, and presses into its service all things else which can help it in each particular case to sustain the marriage and repel the conclusion of unlawful commerce." And again, in Section 959 the same author says: "Persons dwelling together in apparent matrimony are presumed, in the absence of any counter presumption or evidence special to the case, to be in fact married. The reason is that such is the common order of society, and that if the parties are not what they hold themselves out to be they would be living in constant violation of decency and law."

This being the philosophy of the law in indulging this presumption, why permit it in such a case as the present, where to do so will not repel the conclusion of "unlawful commerce," or relieve the

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parties from the stigma of living in violation of law and decency? On the contrary, the indulgence of the presumption, in the face of the fact of her previous and still subsisting marriage to complainant, would be to make her guilty of the crime of bigamy. In such case there is no ground for a presumption of marriage; the second or last relation is simply illicit and nothing more. *Id.*, Vol. 1, Sec. 1029; *Jones v. Jones*, 48 Md., 391; *Allen v. McCullough*, 2 Heis., 185.

Not only in this was the trial Judge in error, but he also erred in his interpretation of the Subsec. 2 of the Sec. 4201 of the (Shannon's) Code, upon the authority of which he rested his decree. This subsection provides that if either party has knowingly entered into a second marriage in violation of a previous marriage still subsisting, "this shall be a cause for divorce from the bonds of matrimony." The trial Judge held that the purpose of this section was to give the party to the first marriage who is outraged by this second marriage, a new and independent ground for divorce. In the first place, it may be asked why give the aggrieved party to the first marriage this as a ground for divorce, when no ceremony, however solemn, can give the sanction of law to this new undertaking, but the parties to it begin and will continue to live in an illicit relation? The second marriage is void *ipso facto*, and the party to the first marriage who has entered into it is guilty of adultery no less than

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if the relation had been confessedly meretricious from the beginning. This being so, the question naturally arises, when adultery is provided in the immediately succeeding subsection as a special ground for divorce, why should the Legislature also have made provision for it under the subsection we are now considering? We are satisfied that it has not done so, but that these subsections are intended to furnish grounds for divorce to two distinct classes of persons.

Adultery is an offense committed by one who is a party to a legal, subsisting marriage, and therefore is committed after the marriage relation is established. Subsection 3 provides this as a ground for divorce to the innocent party to this relation, who is aggrieved by the adulterous conduct of the other party, while Subsection 2 is intended for the relief of one who has innocently been unfortunate enough to have become entangled in an apparent marriage relation with another who has entered into the apparent second marriage knowing that his or her act was in violation of a previous marriage still subsisting. It is true this second marriage is void *ab initio*, yet it is of practical importance to the injured party that it should be judicially declared so; as a public record gives evidence of the marriage, it is desirable that one equally as public should contain the decree pronouncing its invalidity.

We have no doubt that this was the sole purpose of the Legislature in enacting this clause of the divorce law. In support of the contrary view our

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attention has been called to the case of *Ralston v. Ralston*, 15 Pa. (Court Rep.), 597. In that case the Court had occasion to consider a statute of Pennsylvania somewhat similar in terms to ours on this point, and, largely as a matter of grammatical construction, reached a conclusion like that of the trial Judge in this case. The opinion in that case concedes, however, that the opposite view had widely obtained and had been "at least generally acquiesced in."

However it may be with the Pennsylvania statute, there are at least no terms in ours which involve any rule of interpretation which can serve to drive us away from what we believe is its natural and proper meaning. Outside of the case of *Ralston v. Ralston*, *supra*, we have found only one other where such a statutory provision as we are now considering has been the subject of judicial construction, and that is in the case of *Smith v. Smith*, 5 Ohio St., 32. In that case the Supreme Court of Ohio adopt the view we have undertaken to express.

This leaves complainant, then, resting his application for divorce alone on the ground of the adultery of his wife. On this ground he must fail. We think the record convicts him of a violation of his marriage vows. This is enough to bar him from relief on that ground. Code (S.), § 4213.

The cross bill of Mrs. Moore was properly dismissed; in all other respects the judgment of the Court below is reversed, and the bill of complainant is dismissed with costs of both Courts.

Brien v. Robinson.

BRIEN v. ROBINSON.

(*Nashville.* March 16, 1899.)

1. COUNTY COURT. *Has jurisdiction to remove trustees.*

County Court has jurisdiction to remove trustees appointed by deed or will. (*Post*, pp. 166-167.)

Code construed: § 5414 (S.); § 4393 (M. & V.); § 3647 (T. & S.).

2. CODE. *Rules of construction.*

The presumption that the Code was not intended to change but only to compile the old statutes, which prevails in cases of doubtful construction, has no application or force where the Code provision is new, and its meaning perfectly plain and unambiguous. (*Post*, p. 167.)

Cases cited and approved: *Bates v. Sullivan*, 3 Head, 633; *Tennessee Hospital v. Fuqua*, 1 Lea, 611; *State v. McConnell*, 3 Lea, 338; *State v. Runnels*, 92 Tenn., 323; *Trust Co. v. Weaver*, *ante*, p. 66.

3. DEED. *Ineffectual to create a remainder, when.*

The general rule for the construction of deeds and wills undertaking to create remainders is this: If the first taker is given an estate in fee or for life, coupled with an unlimited power of disposition, the fee or absolute estate vests in him, and the limitation over is void. If the power is dependent upon a contingency, or is definitely qualified, the estate of the first taker is limited to life, and the remainder over takes effect. In order to constitute a valid remainder or executory devise, the first taker must not be given power to defeat and extinguish it, by sale or otherwise, at his will and pleasure. (*Post*, pp. 168, 169.)

Case cited and approved: *Bradley v. Carnes*, 94 Tenn., 27.

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4. SAME. Same. Example.

A deed gives an absolute estate to the wife and nothing to the grantor's children, which conveys land to a trustee, in terms for the use of the wife for life with remainder to the children, but directs the trustee to permit her to occupy and cultivate it or rent it out, and use the usufruct or rents for any purpose she may choose, and authorizes her to give any of the property she may choose to the children, to be charged as an advancement, and further makes it the duty of the trustee, upon her written request duly witnessed, to convey the property and place its proceeds at her disposal, to be reinvested or used by her at her discretion. (*Post*, pp. 160, 161, 168-170.)

Cases cited and distinguished: *Deadrick v. Armour*, 10 Hum., 588; *Bridgewater v. Gordon*, 2 Sneed, 5; *McClung v. McMillan*, 1 Heis., 655.

5. TRUSTEE. Authority construed as direction.

A trustee has no discretion, but must execute conveyance when requested under a deed authorizing him to convey upon the written request of the beneficiary and to place the proceeds of the sale at the latter's disposal. (*Post*, pp. 171, 172.)

6. SAME. Parties to removal proceedings.

Though named as remaindermen in the deed, the grantor's children are not necessary parties to a proceeding for the removal of a trustee appointed by the deed, where it is construed as giving the absolute estate to his wife and nothing to his children. (*Post*, p. 172.)

7. RES ADJUDICATA. Against ancestor, binds heir.

An adjudication against the ancestor is conclusive upon the heir. (*Post*, pp. 173, 174.)

8. SHERIFF'S DEED. Void, when.

A Sheriff's deed is void which is based upon a levy and sale in bulk of two adjoining town lots, divided by a fence, and bearing distinct numbers, and occupied by separate houses and tenants. (*Post*, pp. 174-176.)

9. SAME. Same.

A Sheriff's deed will not be enforced in equity under which the execution creditor acquires, through a levy and sale made at

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his special instance and direction, \$3,000 to \$4,000 worth of his debtor's property, under a judgment for only \$750. (*Post*, pp. 175, 176.)

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
H. H. Cook, Ch.

GRANBERY & MARKS for Brien.

SMITH & MADDIN, WADE & SPARKMAN, and JNO.
B. ROBINSON & SON for Robinson.

MCALISTER, J. This is an ejectment bill, brought by the heirs of M. M. and Mrs. Polly Brien against Jno. B. Robinson, B. M. Webb, the heirs of M. M. Brien, Jr., and T. A. Kercheval, to establish title to a certain house and lot in the city of Nashville. Complainants claim title as remaindermen under a certain deed executed by M. M. Brien, Sr., on September 8, 1862, to M. M. Brien, Jr., as trustee. The claim of Jno. B. Robinson is based on a deed executed to him on the — day of ———, 1883, by M. M. Brien, Polly Brien, and T. A. Kercheval, trustee. B. M. Webb claims title by virtue of an alleged purchase of same at a Sheriff's sale, as the property of John B. Robinson. The fight presented upon the record is thus a triangular one, and the contest has been waged with great ear-

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ness and ability. We proceed at once to a consideration of the controlling questions arising upon the record. The facts necessary to be stated, as found by the Court of Chancery Appeals, are as follows, to wit:

On September 8, 1862, M. M. Brien, Sr., conveyed to his son, M. M. Brien, Jr., among other property, the house and lot in controversy, situated on South Summer Street, in the city of Nashville. After describing the property, the deed recites, viz.: "This conveyance is made, however, for the following uses and trusts, and for no other purpose—that is to say, as life and the reverses of this world are uncertain, and as I desire a comfortable and decent support for my wife, Polly Brien, and our children, especially our minor children, and to guarantee to them an education, I therefore make the above conveyance and settlement, and direct my said trustee to allow my said wife to take possession and control of the same, to live upon the farm, and cultivate the same, or have it done, or to live upon either lot in the city of Nashville as above conveyed and described, and to rent out the other, or, if thought advisable, to rent out the farm, and that she be allowed to use any or all of the proceeds of the farm or rent, etc., as she may see proper, for the support and comfort of herself, the education of the children, or other use. And, if she may so desire, may give to any of the children aforesaid any of said property, and, in case of a gift, it is to be

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received as an advancement, as of my estate. I desire my said son to act as trustee, as aforesaid, free of charge, to take all notes, as trustee, for the use, etc., of Mrs. Polly Brien. In the meantime to look after and see to everything by himself or agents, but not to be responsible for neglect or waste, unless in case of gross neglect or fraud, neither of which do I fear from my said son. This use and trust to continue during the natural life of my said wife. It is further understood that my said wife may, at any time, in writing witnessed by two witnesses, authorize my said son to sell any or all of the real estate or slaves above conveyed, and his deed or bill of sale, made in due form as trustee, shall and is to be good and convey a legal title, the proceeds of sale, if any there be, to be held and used by my said wife, or reinvested as she may direct, and to be and bear the same relation, and to take the same course, as the above-named conveyed property. At the death of my said wife, the remainder of said property to vest in my said children then surviving, or their representatives, according to the laws of descent, and to be equally divided among them. This September 8, 1862.

“[SEAL.] MANSON M. BRIEN.”

It appears that in 1883 M. M. Brien, Sr., became financially embarrassed. As guardian of the Schurer heirs a judgment had been pronounced against him, the defendant, John B. Robinson, W. B. Stokes,

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and other sureties on his bond, for an amount exceeding seven thousand dollars, due his wards' estate. With a view of settling this liability, Brien undertook to procure a conveyance of the Summer Street property to Robinson. It was agreed between Brien and Robinson that the latter should take the property at a valuation of \$10,000, settle the Schurer judgment, and pay the balance to Mrs. Brien. Mr. Brien then procured his wife, Mrs. Polly Brien, to execute a formal written request to the trustee, M. M. Brien, Jr., to convey the Summer Street property to Robinson. The trustee positively declined to execute the conveyance. Thereupon proceedings were commenced in the County Court of Davidson County to remove him, which was accordingly done, and Thos. A. Kercheval was appointed in his stead. Mrs. Polly Brien then joined her husband, M. M. Brien, in a written request to Thos. A. Kercheval, trustee, who accordingly executed the deed. It appears that M. M. Brien also joined in this deed, and therein conveyed to Mrs. Polly Brien various lots in the city of Nashville and County of Davidson, which Mrs. Brien agreed to receive in exchange for the Summer Street property therein conveyed to Jno. B. Robinson. It appears that a second deed was executed by Thos. A. Kercheval, trustee, designed to supply certain omissions in the first deed. These deeds were duly acknowledged and registered. It appears that Robinson went into possession of the Summer Street property, and some time in 1883 ad-

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vertised it for sale, whereupon an original bill was filed in the Chancery Court at Nashville by Thos. A. Kercheval, as trustee of Mrs. Polly Brien, and Mrs. Polly Brien by her next friend, Thos. A. Kercheval, against Jno. B. Robinson and M. M. Brien. This bill recited the execution of the trust deed to M. M. Brien, Jr., September 8, 1862, his refusal to execute the deed to Jno. B. Robinson, in accordance with the written request of Mrs. Polly Brien, his removal as trustee by the County Court, the appointment of Thos. A. Kercheval, as trustee in his stead, and the sale of the Summer Street property to Jno. B. Robinson, but the bill alleged that Robinson had not paid the Schurer judgment for \$7,000. It was alleged that Mrs. Polly Brien had been unduly influenced and coerced into signing the request to the trustee to convey the Summer Street property, and that she had signed it under duress and because of threats. It was alleged that the trustee, Kercheval, had signed the deed because he supposed he had no other alternative under the written request of Mrs. Polly Brien. It was also alleged that the deed was executed under the promise of Robinson that he would make immediate payment of \$3,000 into the hands of Mrs. Brien, with which she might purchase a home, which had not been done. It was further alleged that the property which M. M. Brien had conveyed to Mrs. Polly Brien, in substitution of the Summer Street property, was not owned by him, but that the title was in

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third parties; that she had thereby been deceived, and her signature to the deed procured by misrepresentation, duress, and fraud. It was further alleged that Robinson had not paid the purchase money, and had not complied with his part of the contract. The bill prayed that the contract of sale to Robinson be rescinded upon the ground of fraud; but if that could not be done, that a specific performance of said contract be enforced, and that Robinson be required to pay the Schurer judgment of \$7,000, and the balance, \$3,000, to Mrs. Brien.

Robinson, in his answer to this bill, denied all its material allegations, but admitted he had not paid all the purchase money, averring that he was proceeding to sell this property to raise funds with which to pay off the Schurer judgment, when he was stopped by the injunction. He averred that part of his own property had already gone in satisfaction of the Schurer debt, and other pieces had been levied on. The cause went to proof, and, on final hearing, the Chancellor granted complainants full relief. This Court, however, at its December term, 1887, reversed the decree of the Chancellor, and decreed in favor of defendant, Robinson, holding his title valid, and that he was an innocent purchaser of the property, and remanded the cause for an account as to rents, etc. On October 29, 1889, a decree was entered in the Chancery Court settling all the questions then involved, and reciting the pay-

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ment of \$100 as being balance in full due from Robinson.

The present bill was filed on the third of April, 1897, by the heirs of Mrs. Polly Brien, claiming the property in question under the provisions of the trust deed to M. M. Brien, Jr., executed in 1862. The bill attacks the decree of the County Court removing M. M. Brien, Jr., as trustee, and appointing Thos. A. Kercheval in his stead, for the reason that none of the beneficiaries under the deed of trust were made parties defendant or had notice of the proceedings, hence the Court was without jurisdiction and the decree was void.

It was further alleged that Mrs. Brien was induced to sign the deed under duress and threats, and that the consideration had never been paid. It was further alleged that the sale of the Summer Street property from the trustee, Kercheval, to Robinson, was without consideration, and was a violation of the trust. It appeared from the bill that Mrs. Polly Brien had died in 1892, and that complainants were her children.

Defendants, in their answer, denied all the equities of complainants' bill, and relied upon the regularity of the removal proceedings of the County Court. Robinson further averred that he purchased without notice of any equities; that he had paid the Schurer debt, and also the balance due on said purchase money. The proceedings under the bill brought by Kercheval, trustee, and Mrs. Polly Brien,

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which have already been recited, are pleaded by Robinson and relied on as *res adjudicata* of the questions herein.

The cause went to proof, and, upon final hearing, Chancellor Cook dismissed the bill. The Court of Chancery Appeals reversed the decree of the Chancellor and granted complainants full relief. It is urged on behalf of complainant that the County Court had no jurisdiction to remove or appoint a trustee under a will or deed, but that its jurisdiction is restricted to the removal and appointment of trustees under assignments to secure creditors. Section 5414, Shannon's Code, provides, viz.: "The Chancery Court and County Courts have concurrent jurisdiction to accept the resignation of trustees, or to remove and appoint trustees, under the provisions of this chapter." This section is brought forward from the Code of 1858, which was adopted and enacted into a law.

It is suggested in argument that the Act simply recites that the several Courts have—that is, at the time of the enactment of the Code into law—already the jurisdiction which the section recites they have. It is said no statement is made that the existing law is changed, but there is simply a recital of the existing law on the subject. The argument is then made that, as a matter of fact, no statute was then in existence conferring upon the County Court jurisdiction to remove and appoint trustees, and that it is a general rule of construction that in

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doubtful cases it would be presumed that the Code was not intended to change, but only to compile, the old statutes. *Bates v. Sullivan*, 3 Head, 633; *Tennessee Hospital v. Fuqua*, 1 Lea, 611; *State v. McConnell*, 3 Lea, 338.

We think the rule announced in those cases wholly inapplicable in the present instance. We have here no statute of doubtful construction. The Act itself is perfectly plain and unambiguous. It is found in the Code of 1858, and it is wholly immaterial whether it had any existence prior to that time or not. In *State v. Runnells*, 92 Tenn., 323, in speaking of the Code of 1858, this Court said, viz.: "This book was adopted by the Legislature as a whole, the title and the enacting clause of the act of adoption being, viz.: 'An Act to revise the statutes of the State of Tennessee. Be it enacted by the General Assembly of the State of Tennessee: Section 1. That the general statutes of the State of Tennessee shall be as follows, to wit,' " etc. *Nashville Trust Co. v. Weaver*, MS., Nashville, December Term, 1898. The section of the Code in question is to be treated as if enacted at the adoption of the Code of 1858, and, in our opinion, the jurisdiction of the County Court to appoint and remove trustees is undoubted and unquestioned.

Second.—The Court of Chancery Appeals further held that the heirs of M. M. and Polly Brien took a vested interest in remainder in the property conveyed by the deed of trust, and were necessary

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parties to any proceeding seeking to remove the trustee and appoint his successor, and, since the heirs were not parties to the proceeding, the order of the County Court removing M. M. Brien, Jr., as trustee, and substituting T. A. Kercheval, was void. This holding of the Court of Chancery Appeals is assigned as error. It is insisted on behalf of defendants that, by virtue of the deed from M. M. Brien, Sr., to M. M. Brien, Jr., trustee, an unlimited power of disposition was given to Mrs. Polly Brien, the first taker, acting through the trustee, and that as the entire estate passed to her, she and her trustee only were necessary parties in the matter of the removal of the trustee. The rule announced by this Court is viz.: If the first taker is given an estate in fee, or for life, coupled with an unlimited power of disposition, the fee or absolute estate vests in the first taker, and the limitation over is void. If the power is dependent upon a contingency, or if the power be definitely qualified, the estate of the first taker is limited to life, and the remainder over takes effect. *Bradley v. Carnes*, 10 Pickle, citing many cases.

“The principle underlying these cases,” said the Court, “is that in order to constitute a valid remainder or executory devise, the first taker must not be given power to defeat and extinguish it, by sale or otherwise, at his will and pleasure.” The question, then, to be determined, is whether Mrs. Brien’s power of disposition over this trust estate was unlimited. It is argued, in the first place,

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that the intention of the grantor to create a trust is very manifest from this language, to wit: "This conveyance is made, however, for the following uses and trusts, and for no other purpose—that is to say, as life and the reverses of this world are uncertain, and as I desire a comfortable and decent support for my wife, Polly Brien, and our children, especially our minor children, and to guarantee to them an education, I therefore make the following conveyance and settlement." This purpose is manifest from this language: "This use and trust to continue during the natural life of my said wife. . . . At the death of my said wife the remainder of my property to vest in my said children then surviving, or their representatives, according to the laws of descent, and to be equally divided among them."

The power of disposition conferred upon the wife is found in the following provisions of the deed, to wit: "I direct my said trustee to allow my said wife to take possession and control the same, and to live upon the farm and cultivate the same, or have it done, or to live upon the lot in the city of Nashville and to rent out the other, or, if thought advisable, to rent out the farm, and that she may be allowed to use any or all the proceeds of the farm or rent, etc., as she may see proper for the support and comfort of herself, the education of her children, or other use."

It will be observed, the grantor does not limit

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his wife's disposition of the usufruct of the trust estate to the support and comfort of herself and the education of her children, but expressly authorizes her to apply it to any "other use." Again, the deed provides: "And, if she may so desire, may give to any of the children aforesaid any of said property, and, in case of a gift, it is to be received as an advancement as of my estate." But the clause in the deed most relied on as conferring upon the wife an unlimited power of disposition, is the following: "It is further understood that my said wife may, at any time, in writing witnessed by two witnesses, authorize my said son to sell any or all of the real estate or slaves above conveyed, and his deed or bill of sale, made in due form as trustee, shall and is to be good and convey legal title; the proceeds of sale, if any there be, to be held and used by my said wife, or reinvested as she may direct, and to be and to bear the same relation and to take the same course as the above named conveyed property. At the death of my said wife, the remainder of said property to vest in my children then surviving, or their representatives, according to the law of descent, and to be equally divided among them."

The Court of Chancery Appeals was of opinion "that the power to convey must be exercised by the trustee on the authority of the wife, in pursuance of the purposes of the trust. It could not be said that a power was here given to authorize her to dispose of the property so that the purpose of the trust

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might be wholly defeated and the property removed from its operations. In any event," said that Court, "her power of disposition was limited by the action and assent of the trustee. . . . As we construe the paper, the trustee was authorized, but not compelled, to convey on the written request of Mrs. Polly Brien.

"The case of *Deadrick v. Armour*, 10 Hum., 588-594, is cited by counsel, in which it appeared that the conveyance was to a trustee for a married woman and the power given was to sell, use, and dispose of it as she may think fit, but by and with the consent of the trustee. The Court held that the power was limited and special, requiring the consent of the trustee, which was discretionary, and such as a Court of Equity would have no power to control, and consequently that the wife did not take an estate in fee but only a life estate. Counsel also rely upon the cases of *Bridgewater v. Gordon*, 2 Sneed, 5, and *McClung v. McMillan*, 1 Heis., 655."

We cannot concur with the Court of Chancery Appeals in its construction of this instrument. It seems to us quite clear that by the terms of the deed an unlimited power of disposition is conferred upon Mrs. Brien, and the limitation over is thereby defeated. In our opinion the trustee under the deed of M. M. Brien, Sr., executed in 1862, had no discretion, but was compelled to execute a conveyance of any or all of the property whenever requested

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by Mrs. Brien—provided her request was in writing and attested by two witnesses.

•In our opinion the term “authorize my said son to sell any or all the real estate,” etc., was equivalent to the use of the term “require” or direct, for in the immediate context it is stated that the proceeds of sale may be used by her or reinvested as she may “direct.” The trustee had no power to withhold his consent, and, in this respect, the present case is wholly unlike *Deadrick v. Armour*, 10 Hum., 588. Nor do we think this case falls within the rule announced in *Bridgewater v. Gordon*, 2 Sneed, 5, and *McClung v. McMillan*, 1 Heis., 655.

In our opinion there was neither vested nor contingent remainder in the heirs of Mrs. Polly Brien in the property under the terms of the deed of trust, but Mrs. Polly Brien took the whole estate. It follows that in no view of the case were the heirs of Mrs. Polly Brien necessary parties to the proceeding for the removal of the trustee. Section 5422 (Shannon) provides, viz.: “The application may be made by any one of the beneficiaries.” Section 5423 provides that five days’ notice of the petition shall be given to the trustee. In the removal proceeding in the County Court, Mrs. Brien, the sole beneficiary, and her trustee were both parties, and and thus the requirements of the statute were fully satisfied.

The Court of Chancery Appeals found as a fact

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that Robinson was no party to such duress as was exercised by M. M. Brien over his wife, Polly Brien, in procuring the execution of the deed, and that the duress was not of such a character as to threaten Mrs. Brien with personal danger, but was of such a character as to make it unpleasant and to induce her, in order to obtain peace, to execute the deeds. The Court of Chancery Appeals also found, as a matter of fact, that Robinson knew, at the time the conveyance was executed to him, that Mrs. Brien and the trustee were getting nothing in return for the property conveyed to him, unless it should be the two thousand dollars over and above the Schurer debt. It appears that the claim for the two thousand dollars was settled by the payment of back taxes on the property and by the rents that were received pending the litigation in the Kercheval case. That Court further finds there was an absolute misappropriation of the trust property by this sale and conveyance to Robinson, and that he necessarily knew of it, participating in the fraud practiced on the trust in order to secure the payment of his debt, or the liability for which he and his co-sureties were responsible, and for these reasons, said that Court, the sale to Robinson was illegal and void, certainly as to all the beneficiaries of the trust, excepting Mrs. Polly Brien, who joined in the deed.

All these questions were made, or were necessarily involved, in the former litigation between Kercheval, trustee, and John B. Robinson. Mrs. Polly

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Brien was a party to that litigation, wherein the Court decided that Robinson was an innocent purchaser of the property and acquired a good title. It is true these heirs were not parties to that proceeding, but since we hold they take neither a vested nor contingent remainder in the property, they are necessarily bound by the adjudication against their ancestor.

This disposes of all the questions at issue between complainants and John B. Robinson, and results in a decree in favor of the latter, unless the claim of Judge B. M. Webb, presented by cross bill, shall be held superior to that of Robinson. As already stated, Webb claims the property as purchaser at an execution sale and by virtue of a Sheriff's deed. The proceedings under which Webb claims title are attacked on various grounds.

On February 20, 1891, defendant, B. M. Webb, together with certain other parties, recovered a judgment in the Chancery Court of DeKalb County against defendant John B. Robinson, and on June 29, 1894, an execution was issued upon this judgment to the Sheriff of Davidson County, and it was levied upon the house and lot on Summer Street as the property of John B. Robinson.

In this answer and cross bill Webb sets up the fact that the firm of Gribble, Webb & Avant obtained judgment against defendant, Robinson, in the case of *Gribble, Webb & Avant v. G. R. West et al.*, for about \$600, in the Chancery Court at

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Smithville, to which John B. Robinson was a party defendant; and that in June, 1894, execution was issued on this judgment and levied upon the property in South Nashville as the property of John B. Robinson; that it was sold on the eleventh day of August, 1894, and was bid off by cross complainant, Webb, at the Sheriff's sale, for about \$750; that this property was never redeemed by Robinson, and that he (Webb) held a Sheriff's deed therefor, which had been filed for registration on the seventeenth day of December, 1896.

To this cross bill filed by B. M. Webb all the parties to the suit, complainants and defendants, made defense, denying the validity of the proceedings under which Webb claims title to the property.

Defendant John B. Robinson filed an elaborate answer to this cross bill, attacking in many ways the proceedings in the Chancery Court of DeKalb County.

The fourth assignment of error is that Webb acquired no title to the property in question, for the reason that his execution was levied on two town lots and they were sold in bulk and not separately. It is shown there was a house on each of the two lots worth largely more than the amount of the judgment. The return of the Sheriff was, viz.: "Executed by levying this *fi. fa.* upon all the right, title, claim, and interest that J. B. Robinson has in and to the following described property, to wit: Two lots or parcels of land in the city of Nashville, Davidson County, Tennessee, described as follows, to

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wit: Fronting 67 feet on the east side of South Summer Street and running back between parallel lines 178 feet to an alley, and being lots Nos. 36 and 37 of Barrow Grove plan, and being the same lots conveyed to J. B. Robinson by deeds from M. M. Brien *et al.*, recorded in Book 81, pp. 6 and 10, R. O. D. C., and being levied on as the property of J. B. Robinson." The Court of Chancery Appeals finds that prior to the sale to Robinson the property was treated as one lot and occupied by the Briens as such, and that while the Sheriff refers to the property as made up of two lots, giving their numbers, he levied on it substantially as one tract. That Court further finds that the property consisted of two lots; that there are two houses separately numbered, and occupied by different tenants, with the lots divided in the front and rear by a fence, and that this was the condition of the property at the time it was levied on; that there is a frame house with six rooms, four halls, and a porch, and a brick house with nine rooms, four halls, and four porches. We understand the Court of Chancery Appeals to find these facts from the testimony of Jno. B. Robinson, and they are undisputed. That Court says: "It is true it would have been competent and proper for the Sheriff to have levied on a part of this property. He might have levied on the south 38½ feet, but did not do so." We think it would have been not only proper and competent for the Sheriff to have so levied, but that it was

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his duty to do so, and the sale in bulk of the two lots, and not separately, rendered sale void, and communicated no title to the purchaser.

Again, aside from this, we think the levy was excessive. The judgment was for only \$750, and the property levied on was worth \$3,000 or \$4,000; and while ordinarily the title of an outside purchaser, under the authorities, would not be affected by the fact of an excessive levy, yet we think when it is shown, as in this case, that the property was purchased by the judgment creditor, and the excessive levy was made at his especial instance and direction, then his title is affected by this act, and a Court of Equity will refuse to enforce his purchase. There are other irregularities in the proceedings which also probably invalidate Webb's title, but we prefer to rest the case upon the two grounds mentioned.

The decree of the Chancery Court of Appeals is reversed, and the original bill of complainant, as well as the cross bill of Webb, will be dismissed and the costs divided between said original and cross complainants.

Weakley v. Page.

WEAKLEY v. PAGE.

(Nashville. March 16, 1899.)

1. NUISANCE. *Jurisdiction to enjoin.*

A Court of Equity has jurisdiction to enjoin the owner of property from keeping or permitting a house of ill fame to be kept therein, at the suit of owners of adjacent or contiguous properties adapted and used for business and residence purposes, where, by reason of the boisterous and vulgar conversation and the public, immoral, and indecent conduct and exposure of person of the inmates of the house and their visitors, it has become a nuisance to the entire neighborhood, and has seriously affected and impaired the value and rental productiveness of the complainant's property. (*Post*, pp. 191-206.)

Cases cited and approved: *Brew v. Van Deman*, 6 Heis., 433; *Lassiter v. Garrett*, 4 Bax., 368; 11 Md., 128.

2. SAME. *Same.*

The jurisdiction of Courts of Equity to enjoin and abate nuisances is not affected by the statute giving the power to Courts of Law to abate a nuisance where the fact of nuisance is found in a civil action. (*Post*. p. 192.)

3. SAME. *Same.*

A Court of Equity will enjoin and abate a nuisance, without a judgment at law establishing its existence, where the fact of nuisance is made manifest by certain and reliable proof, and the resulting injury is of a character that cannot be compensated adequately by damages. (*Post*, pp. 192, 193.)

Cases cited and approved: *Vaughn v. Law*, 1 Hum., 134; *Clack v. White*, 2 Swan, 540; *Phillips v. Stocket*, 1 Tenn., 200; *Wall v. Cloud*, 3 Hum., 182; *Kirkman v. Handy*, 11 Hum., 407; *Naff v. Martin*, 2 Shan., 451; *Caldwell v. Knott*, 10 Yer., 210.

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4. SAME. *Same.*

That a nuisance is the subject of criminal prosecution does not deprive the Court of the power to enjoin and abate it at the suit of a citizen who has suffered special injury from it. (*Post*, pp. 195, 196.)

Cases cited: 27 N. H., 503; 63 N. H., 12; 28 Kan., 726; 65 Iowa, 488; 149 Mass., 550 (S. C., 5 L. R. A., 193); 1 Dev. Eq., 12; 10 Ill., 351; 26 Iowa, 377; 87 Ill., 450.

5. SAME. *Same.*

The Court will not enjoin and abate a public nuisance unless the complainant avers and proves some injury special and peculiar to himself which is not shared by the general public. (*Post*, p. 194.)

Cases cited: 14 Conn., 565; 2 C. E. Green, 75; 3 Neb., 179; 2 Beas., 68.

6. SAME. *Same.*

If otherwise entitled to an injunction against a nuisance, the complainant will not be repelled because he does not himself occupy the property involved. (*Post*, pp. 203, 204.)

7. SAME. *Same.*

Both residence and business properties will be protected by injunction against nuisances specially affecting their values, but relief will be granted more readily in favor of residence than of business properties. (*Post*, pp. 204-206.)

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
H. H. COOK, Ch.

LELLYETT & BARR for Weakley.

N. D. MALONE and M. W. ALLEN for Page.

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CALDWELL, J. This cause comes to this Court on the appeal of the defendants from the decree of the Court of Chancery Appeals. The controlling questions presented in the assignment of errors and argument before us are the same as those considered by that Court in an elaborate and able opinion delivered by Judge Neil. We refer to that opinion for a statement and discussion of those questions. It is as follows: "This bill was originally filed by R. L. Weakley and Mrs. Sarah C. Paige. As to the latter, the suit was dismissed below on her own motion, and subsequently proceeded in the name of Mr. Weakley alone. We shall, therefore, set forth such allegations as were made by Mr. Weakley, ignoring those especially referring to Mrs. Paige. The purpose of the bill is to abate, as a nuisance, a house of ill fame, existing in close proximity to complainant's property, on the ground of special injury to the complainant. The bill alleges that W. W. Page owned and controlled a block of buildings on the corner of Line and College Streets in the city of Nashville; that the first floor is divided into three store rooms; that the second story is divided into rooms and halls, and is suitable for residence purposes.

"It is further alleged that complainant Weakley owns a block adjoining the property of Page, on College Street, immediately north of said Page building, and running back west with that building about 174 feet; that said Weakley's building fronts on

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College street and contains two stories, the first consisting of three business houses or store rooms and the second cut into halls, corridors, rooms, etc., with the necessary stairways for ingress and egress, suitable and intended for residence purposes; that complainant, Weakley, also owns a block of three two-story buildings on the east side of College Street, and fronting the said W. W. Page property; that this property also contains three store rooms on the first floor and residence rooms in the second story.

“It is further alleged that the rental value of complainant, R. L. Weakley’s, said block of two-story brick buildings is about \$110 per month. It is further alleged that the defendant, W. W. Page, a short time before the filing of the bill, had put the defendant, Mattie Vaughn, in possession of the second story of his block of buildings, and that she and those residing with her had occupied this property for one or more months prior to the filing of the bill; that Mattie Vaughn was and is an abandoned and disreputable woman, and her character as such was well known to the defendant, Page; that the defendant, Mattie Vaughn, has had and still has with her, in said second story of said building, ten or twelve abandoned women, and is there conducting a bagnio, which is publicly and notoriously frequented day and night by numbers of men and boys for immoral purposes; that the defendant, Mattie Vaughn, and the women with her are engaged in the illegal sale of intoxicating liquors on the prem-

ises, and that drunkenness is added to their other disturbing practices; that this conduct and these practices are open, public, and notorious, and the reputation of the place is widely known, and that residents in the locality and passers-by are offended and disturbed, and the rental and money value of complainant's property in that locality is greatly reduced thereby; that many of the houses in the immediate neighborhood, and especially the three two-story brick buildings on the west side of College Street, complainant's buildings, were, at the time the bill was filed, vacant, and that respectable tenants could not be procured on account of the proximity of the bagnio; that complainant is being greatly damaged by the loss of rents and depreciation in the value of his property on account of this nuisance, and is subjected to further loss, and can only be protected against irreparable injury by the injunctive aid of the Court.

“It is further charged that it is unlawful to let premises for such purposes; that keeping a house of ill fame is a nuisance under the laws of this State; that defendant, Page, is well apprised of the uses being made of said premises, and knew that they would be so used before he made the arrangement with his co-defendant, and connived, and continues to connive, at the same.

“It is further charged that ‘the public and community are shocked and offended at the existence of said resort, and said premises and their uses are

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both a private and public nuisance.' There is also an allegation that the sounds and sights attendant upon the occupation of the Page premises by defendant, Vaughn, and the women with her, are offensive, disturbing, and humiliating.

“The substance of the bill as to the nuisance is, that the defendant, Mattie Vaughn, with the connivance of Page, the owner of the premises, is conducting a house of ill fame with several lewd and abandoned women under her charge; that the house is publicly and notoriously frequented, by day and by night, by numbers of men and boys for indulgence in lewd and immoral practices; that added to these practices in the place referred to, is that of drunkenness, fostered by the illegal sale of liquor on the premises; that the place is widely known; that the conduct and practices of the house are open, public, and notorious; that there are attendant sights and sounds which are disturbing, offensive, and humiliating to the residents in the neighborhood and to passers-by; that, as a consequence, complainant's property adjoining and near by has been very greatly damaged in its rental and money value, and is being very greatly damaged thereby, and that complainant is being subjected to further loss, and can only be protected from irreparable injury by the injunctive aid of the Court; that by reason of such nuisance he has lost valuable tenants and his houses are empty, and that respectable tenants can-

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not be procured for complainant's buildings on account of the bagnio.

“The facts as stated in the bill are substantially true with a few exceptions, which will now be stated. These exceptions are, that at the time the bill was filed, while complainant's houses on the west side of College Street were vacant those on the east side were occupied, but at a greatly reduced rent; and, further, it should be stated that pending the suit most of complainant's houses (all but one) on the west side of College Street were occupied by tenants, but at greatly reduced rents. These tenants went in some time after the suit was begun. Another exception that must be made is, that while defendant, Vaughn, did not occupy the front of the Page building until about one month before the bill was filed, she, or some other woman similarly employed, had occupied the back portion of that building for some years.

“The facts with regard to the nuisance appear in the proof with more detail than is stated above, and it is proper to refer to this testimony, which we shall now do.

“The witness, Klymon, says that the women leave the blinds on the front windows open, and can be seen from the outside naked in their rooms with men, and that conduct of this kind continues from about 3 or 4 o'clock in the afternoons until far into the night; that men come and go in crowds; that sometimes there are as many as ten or twelve

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backs there. Continuing, he says: 'There is a good deal of noise, big noise, cursing and obscene language. The whole Page block upstairs is now occupied by them. They disturb the neighborhood so that respectable people cannot sleep and rest in the neighborhood, and the families and children are disturbed by them.' He further says that about two or three weeks before his deposition was taken, 'women, about 2 or 3 o'clock in the morning, threw a great many beer bottles, making a noise, cursing and calling vulgar names that could be heard blocks away. It attracted crowds of people, and caused much disturbance to the neighbors.'

"J. R. Whiteley, a policeman, says: 'We went to this house twice about the first or middle of 1896 for the purpose of quieting boisterous conduct;' that when he got there he found men and women dancing and singing, also they were drinking and talking loud and hallooing, and he threatened to arrest the 'whole crowd' if they did not stop.

"S. Rosenfield says: 'They cut up, laughing, singing, and hallooing, making vulgar music, cursing; have seen them through the windows, partly undressed, and crowds of men going there day and night.'

"Mrs. Jennie Murray says: 'I have seen the women who occupy this building sitting on the porch which runs along the north side of the Page building exposing their persons, smoking cigars, playing cards with men, laughing and shouting, and using

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vulgar and obscene language, calling to all men they see, attracting passing men, and generally conducting themselves indecently.'

"F. M. Shuster says; 'They are very noisy at night. I have frequently heard them scream, and have gotten up at night to learn what the matter was. I have heard loud sounds, sometimes like the slapping of bare skin, with loud laughing, etc., and have seen them pass the window naked in view of the street; have seen a great many men going in and out there. Those disturbances sometimes occurred as late as 2 o'clock in the morning.'

"Mrs. Clara Loubelsky says: 'They can be seen in the hallways in slight garments, smoking cigars, and cursing, pulling and hauling men, trying to get men in. I have seen them naked in the same room with men. I have seen men embrace them when in this condition. Men come to the place at all times at night, driving up in hacks, singing and using vulgar language, which is heard and repeated and used back at them by the women. I have seen the porter going into the building with drinks and lunches. I have seen drunken men go up there often.' She further says: 'I am disturbed all night. You would think the whole building would come down.'

"Mrs. F. Levy, who lives in Mr. Weakley's building that adjoins the Page property, with her family of four boys, aged respectively five, ten, thirteen, and sixteen, and two girls, aged eighteen

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and eleven respectively, says of the women in the Page building: 'They are up all night singing, drinking, cursing, fighting, throwing bottles, going undressed, acting indecently with men, and generally debauching the neighborhood, making the whole neighborhood bad.' This witness testifies that she first lived in complainant's building in the year 1894, beginning on the eighteenth of September, and remaining four months, but moved away because of the inmates of the Page building—in the back part of it upstairs; that she then lived in the upstairs portion of complainant's building, but since she returned occupies a room in the front part and downstairs; that when she returned none of these abandoned women were in the front part of the Page building, but moved in a month or two afterwards.

"The weight of the proof is that the presence of this house, with conduct such as we have detailed, very materially injures the rental value of property in the neighborhood, though there is testimony to the effect that these poor creatures pay higher rent than anybody else, and that their proximity furnishes trade to the small dealers who occupy that locality. However, the testimony of the best informed shows that it inflicts serious injury upon the value of adjoining property and property near by. As to Mr. Weakley's property, while it is now partially occupied (one room downstairs by Mrs. Levy as a grocery store, and three rooms upstairs by Mrs. Cohen for residence purposes, and

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also one room downstairs by her as a grocery store, only one store being still vacant), yet the complainant has suffered seriously in the value of his property in the way of depreciation of rents. He says in his deposition: 'A great many people have refused to rent from me because my property adjoins Page's property. I take people down there to see the property, and as soon as they see how the upper part of this (Page) property is occupied, they won't rent. I took a gentleman down there on one occasion to inspect my houses, he desiring to rent one of them, and after going through he observed some women in scant clothing, undressed, in these apartments, and he immediately declined to rent on the ground that he could not live near such people. This same thing has happened on other occasions, all of which I cannot recall. Q. Has this fact affected the rental of your property? A. Put it down to nothing. When this property, where the women now are (Page's property), was occupied by the Louisville & Nashville Railroad Company's office, several years ago, I got \$900 a year for the large brick on the west side. Now, since these women have come in there, I get \$16 per month for the big brick and \$12 per month for the other two houses, one of which is not rented. Q. What about the property on the other side of the street? A. It has been affected some, too. I got \$900 for the corner of Locust and College and \$25 a month for the middle house, and \$25 for the

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house just adjoining Link's. I now, and since the railroad moved out and this occupation began, only get \$600 a year for the corner, and less for the other two buildings.'

"Some effort is made to show that Mr. Weakley himself rented his buildings to disreputable characters. It is proven that some five years before the bill was filed, when this property was owned by a brother of the complainant, since deceased, such characters were allowed in these buildings or some of them. Since the complainant has owned the property he has steadily refused to rent to such people. It is true, that soon after this suit was begun, a Madame Breeson, a dissolute French woman, rented one of the two rooms, under pretext of opening a cigar stand, but really used it for immoral purposes. As soon as the complainant discovered it he had her ejected from the building by legal process. It is also true that, for a time, one Tom Payne, who seems, from the proof, to have a very bad reputation, ran a saloon in complainant's property on the opposite side of the street—that is, on the east side of College Street—but complainant also refused to rent to him when he discovered the character of the house. The proof fails to attach any blame to the complainant in the particulars referred to.

"It is also insisted by the defendant, an important point, that the whole neighborhood is bad, and that for that reason complainant's property could not be injured by the character of the occupants in the

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upper story of the Page building. The proof shows pretty clearly that Locust Street, which runs into College nearly opposite the Page building, is occupied principally by people of disreputable character, also that Gay Street, the next street to Line, is occupied by people of the same reputation, and also the alley leading from Gay to Line. But the proof fails to show such a character for College Street from Line to the railroad. Northward the character of the street is very bad. As to Line Street, from College to Cherry, the proof is conflicting to such an extent that we are unable to determine how the fact is beyond the Page house, except that there are two houses of this character on the street besides the Page house. Take it altogether, the neighborhood is unsavory. This, however, does not apply to College Street from Line to the railroad crossing. It should be noted that the rear part of the Page building, fronting north, overlooks the rear yard of the Weakley property, used by families living over the Weakley stores, and that running along this Page building on that side is a porch upstairs, and numerous windows opening on to the porch. It should also be noted that on the southern and eastern side of the Page building upstairs there are numerous windows opening on the street.

“In regard to the statement in the bill that Mr. Page was aware of the character of the use to which his building was put, we think it proper to say that we base our finding that the charge is

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true on the ground that he must be presumed to know the use to which his building is put, and also on the proof, which shows that he gave his personal check for \$1,028 to a furniture establishment in the city to fit up this house, as shown by the testimony of C. G. Finney, and further, on the fact that he has not deposed as a witness in this case to deny the grave charges made in the bill or the testimony of Mr. Finney.

“We shall now consider the legal rules that govern the controversy.

“1. The jurisdiction of a Court of Equity to abate nuisances is clear in Tennessee. In *Brew v. Van Deman*, 6 Heis., 433, 440, it is said that a Court of Equity has jurisdiction, upon the ground of its ability to give a more complete and perfect remedy than is attainable at law, to prevent by injunction such nuisances as are threatened, as well as to abate those already existing. ‘The grounds of jurisdiction,’ says the Court, ‘are the restraining of irreparable mischief, suppressing oppressive and interminable litigation, or preventing multiplicity of suits, or where the mischief, from its continuance or permanent character, must occasion a constantly recurring grievance, which cannot be prevented otherwise than by injunction.’ In the case of *Lassiter v. Garrett*, 4 Bax., 368, 370, after quoting the above language, the Court says (in that case the question under consideration was whether a milldam was a nuisance): ‘It is clear that if the dam in question

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has permanently destroyed the health of the complainants, or persons occupying their premises, this would be a constantly recurring grievance and injury, not to be compensated in damages, and a proper case for a Court of Chancery to interpose and compel an abatement of the nuisance, and we are of the opinion that the Act of 1851-52 (Code, § 3403), which authorizes Courts of law to abate nuisances, where the fact of nuisance is found in a civil action, does not take away the jurisdiction of a Court of Chancery. The question is, in what cases and under what circumstances is the jurisdiction exercised? Judge Story laid down the rule that, in all cases of this sort, if the right be doubtful, the Court will direct it to be tried at law, and will, in the meantime, restrain all injurious proceedings, and when the right is fully established a perpetual injunction will be decreed.' In *Vaughn v. Law*, 1 Hum., 134, it is said: 'In a case where the right is clear, and the existence of the nuisance manifest, and the injury is of a character that cannot be compensated in damages, a Court of Chancery interposes to prevent the mischief. In such a case a trial at law is not necessary in order to give the Court jurisdiction.' In *Clack v. White*, 2 Swan, 540, 544, 545, the Court says: 'The rule is well and truly stated in *Vaughn v. Law*. If the fact of nuisance manifestly appears from certain and reliable proof, we see no reason why it should be first established in a Court of Law, if that be the

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only objection.' To the same effect see *Phillips v. Stocket*, 1 Tenn., 200; *Wall v. Cloud*, 3 Hum., 182; *Kirkman v. Handy*, 11 Hum., 407; *Naff v. Martin*, 2 Shann. Tenn. Cases, 451; *Caldwell v. Knott*, 10 Yer., 210.

"2. The facts stated make out a case of nuisance clearly. It is declared in the Code: 'Houses of ill fame kept for the purpose of prostitution and lewdness, gambling houses, or houses where drunkenness, quarreling, or fighting or breaches of the peace are carried on, or permitted, to the disturbance of others, are nuisances also.' Shannon's Code, § 6870. So, under the general law, the keeping of a house of ill fame is such a nuisance as may be relieved against in equity, at the suit of adjacent property owners who are injured thereby. The following citations of authority are in point: High on Injunctions (2d Ed., Vol. 2, Secs. 772, 773, 779, 780, 782). In the last section it is said: 'The general principles of equity with regard to nuisances and their restraint, apply to houses of ill fame, and the continuance of such houses may be restrained upon a bill filed by private persons, alleging that the close proximity of such nuisance to their private residence deprives them of the comfortable enjoyment of their property, and greatly diminishes its value.' The section just quoted refers for authority to *Hamilton v. Whitridge*, 11 Md., 128. Counsel for complainant also refer to the case of *Anderson v. Doty*, 33 Hun, 160, and *Crawford v. Tyrell*, 128 N. Y.,

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341, as sustaining the same view. We shall have occasion to refer to these cases later on.

“3. Of course, a house of ill fame is a public nuisance. This being true, it is insisted by the defendants that no private citizen can bring a bill to restrain such a nuisance, or any other public nuisance, unless the complainant can show some injury of a serious nature to himself different and apart from the general injury to the public, and, to support this proposition, the defendants cite the following authorities, which sustain the point: *Bigelmo v. Hartford Bridge Co.*, 14 Conn., 565; *Hinchman v. Patterson H. R. Co.*, 2 C. E. Green, 75; *Shed v. Hawthorn*, 3 Neb., 179; *Allen v. Beard*, 2 Beas., 68; also High on Injunctions, 762, 769.

“4. It remains to be settled whether the facts stated make such a case of special and peculiar injury to the complainant as will entitle him to maintain the bill. In the case of *Hamilton v. Whitridge*, *supra*, an injunction was granted upon a bill stating that the appellees were owners of property in the city of Baltimore, in the immediate vicinity of a house which the appellant had purchased, and to which she intended to move, for the purpose of keeping a house of ill fame, in which business she had been for a long time, and was then engaged. The bill charged, also, that in addition to the wrong and injury inflicted upon them, in common with other citizens of that city, by the occupants of the premises, for the unlawful and immoral purposes com-

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plained of, 'the complainants will be especially wronged and injured, inasmuch as they will be deprived of the comfortable enjoyment of their property, and that it will be greatly depreciated and lessened in value, by the close proximity of their said property to the premises in which it is charged that the defendant is about to open a bawdy house.' The Court found that it was true that the appellant was about to open such a house on the property in question, and said: 'We are constrained, therefore, to consider the appellant as a person about to open the premises as a house of ill fame, and the prominent question for decision is whether the jurisdiction of Courts of Equity embraces a prohibition of such public nuisances, where the complaint is that they will, by reason of their close proximity, deprive other persons of the comfortable enjoyment of their property and greatly depreciate and lessen its value.' The question was decided in the affirmative. After referring to the general principle that the complainant must show some special injury to himself, and to cases where the physical senses were offended, as, for instance, where the ringing of church bells was enjoined, when the noise thereby created disturbed the plaintiff and his family, the Court said: 'But the appellant's counsel suggested that a distinction should be taken between the cases relied on in support of their position and the present, because here the object is to prevent what is offensive to the moral sense. We need not inquire

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how far this jurisdiction can be founded on grounds of morality, and to preserve the decencies of life from gross violation. The case does not require this. But it would be strange, indeed, if, when the Court's powers are invoked for the protection and enjoyment of property, and may be rightfully exercised for that purpose, its arm should be paralyzed by the mere circumstance that, in the exercise of this jurisdiction, it might incidentally perform the functions of a moral censor, by suppressing a shocking vice denounced by the law, and amenable to its penalties from the earliest times. And if, as the authorities show, the Court may interfere where the physical senses are offended, the comfort of life destroyed, or health impaired, these alone being the basis of the jurisdiction, the present complainants, presenting, as they do, a case otherwise entitling them to the relief, should not be disappointed merely because the effect of the process will be to protect their families from the moral taint of such an establishment as the appellant proposes to open in their immediate vicinity.' This case was decided in 1857, and, as will be observed, the establishment of a nuisance was restrained because it threatened injury to adjacent property owners. In the case of *Anderson v. Doty*, decided by the Supreme Court of New York in 1884 (33 Hun, 160), it was said that *Hamilton v. Whitridge* might possibly be sustained as an exercise of the power of a Court of Equity to prevent the erection

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of a nuisance, but not to abate a nuisance, which could only be abated by a judgment of the Criminal Court. In *Anderson v. Doty* the nuisance was said to consist merely in the fact that the defendant's house was a house of ill fame, kept as a dwelling place for prostitutes, and a resort for lewd men and women, for lewd purposes, and as a bawdy house. The Court said there was no allegation of any noise or of any physical discomfort or tangible injury to the persons of the occupants of plaintiff's house, or to the property, but the injury complained of was entirely consequential in its nature, arising from the fact that decent people will avoid such places, however quietly conducted, because of the consequences they apprehend may occur, although such apprehension may never be realized. The defendant's counsel based his motion to vacate the injunction upon the grounds that a private action would not lie to restrain a public nuisance, unless the plaintiff should suffer an injury by it to his person or property different in character from that common to all citizens, and, further, that the particular injury must be some physical discomfort or physical injury to the property. The Court sustained this view of the matter, saying: 'In this case there are alleged no offensive sights or sounds from defendant's house, but the injury is caused because the existence of the nuisance gives the neighborhood a bad name. I do not think this is a sufficient injury to plaintiff to enable him to main-

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tain this action.' The Court also said that it was of opinion that Courts of Equity were not proper tribunals to deal with the matter, but that it should be left to the Criminal Courts. There was a strong dissenting opinion by one of the judges. In the later case of *Crawford v. Tyrell*, 128 N. Y., 341, decided by the Court of Appeals of that State in 1891, a different view was taken so far as the last point mentioned in *Anderson v. Doty*, is concerned, and the proposition established that an injunction will lie to restrain a defendant from keeping a house of ill fame and from using his premises for such a purpose, where the persons occupying such premises act in a noisy and boisterous manner and make indecent exposures of their persons. In that case the action was brought to prevent the defendant from keeping a house of ill fame, and from using the premises for such purpose, and to recover damages for injuries sustained. The trial Court found the facts to be that the house, as maintained by defendant, was a resort for prostitutes and licentious men, and that the persons occupying the rooms acted in a boisterous and noisy manner, and indecently exposed their persons at the windows, 'whereby the use and occupation of the plaintiff's premises have been interfered with and rendered uncomfortable, and whereby the occupants of plaintiff's premises have been annoyed and seriously disturbed.' The Court held that this made out a sufficient case for interference by injunction at the suit of a

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property owner. In discussing the question, the Court said that the mere fact of a business being carried on which may be shown to be immoral, and, therefore, prejudicial to the character of the neighborhood, furnishes, of itself, no ground for equitable interference at the suit of a private person; and though the use of the property might be unlawful or unreasonable, unless special damage should be claimed, a neighboring property owner could not base thereupon any private right of action; that it would be for the public authorities, acting in the common interest, to interfere for the suppression of the common nuisance; but that if complainant in such private action could show a special damage, by which the legitimate use of the adjoining property was interfered with, or its occupation rendered unfit or uncomfortable, the action would lie, and the fact that the perpetrator of the nuisance would be amenable to the criminal law would be no answer to an action against him by a private person to recover for the injury sustained, and for an injunction against the continued use of his property or premises in such a manner. In closing the opinion the Court said: 'In the present case the indecent conduct of the occupants of the defendant's house, and the noise therefrom, inasmuch as they rendered the plaintiff's house unfit for comfortable or respectable occupation, and unfit for the purpose it was intended for, were facts which constituted a nuisance and were sufficient grounds for the main-

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tenance of the action. If it was a nuisance which affected the general neighborhood, and was the subject of an indictment for its unlawful and immoral features, the plaintiffs were none the less entitled to their action for any injuries sustained, and to their equitable right to have its continuance restrained.' This opinion being later than *Anderson v. Doty*, and by a Court of higher authority, and supported by stronger reasons, discredits that case in so far as it was based on the ground that a Court of Equity could not properly dispose of such a matter because the nuisance might be made the subject of an indictment in a Criminal Court. In fact, the authorities are overwhelmingly against *Anderson v. Doty* on this point. 'In regard to public nuisances,' says Judge Story, 'the jurisdiction of Courts of Equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. . . . In case of public nuisances . . . an indictment lies to abate them and to punish the offender. But an information also lies in equity to redress the grievance by way of injunction.' Eq. Jur., Secs. 921, 923.

"And again: 'In modern times Courts of Law frequently interfered and granted a remedy under circumstances in which it certainly would have been denied in earlier periods. And sometimes the Legislature, by express enactments, has conferred on Courts of Law the same remedial faculty which belongs to Courts of Equity. In neither case, if the Courts of

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Equity originally obtained and exercised jurisdiction, is that jurisdiction overturned or impaired by this change of the authority at law by legislative enactments, for, unless there are prohibitory or restrictive words used, the uniform interpretation is that they confer concurrent and not exclusive remedial authority.' Story Eq. Jur., Secs. 64, 80. So, where the wrongful flowage of a meadow by a mill pond is made a criminal offense, punishable, on indictment, by fine and imprisonment, this does not take away the specific relief by a bill in equity by injunction. *Wells v. Pearce*, 27 N. H., 503, 512, 513; *Allen v. Gibson*, 63 N. H., 12. So, in *State v. Crawford*, 28 Kan., 726, and 42 Am. Rep., 182 (an action to abate a liquor saloon, declared by a statute to be a common nuisance), the Court said (pages 735, 736): 'While it is unquestionably true that the keeping of the saloon in question is a criminal offense, and its operation involves the commission of many criminal offenses, yet we cannot think that these facts can possibly take away any of the jurisdiction which Courts of Equity might otherwise exercise. It would seem to us that all sound reason and the great weight of authority is against the objection . . . At common law all public nuisances were public offenses, and, if the proposition is sound that no nuisance can be enjoined except such as are not public offenses, then, where the common law has full force, no public nuisance could ever be enjoined.' In the case of *Littleton v. Fritz*, 65 Iowa, 488 (54 Am.

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Rep., 19), the Supreme Court of that State used the following language on the general subject: 'One maintaining a nuisance may not only be punished in a criminal proceeding, but a civil action at law to recover damages in a proper case, and an action in equity to restrain the nuisance may be prosecuted against him. The defendant, in order to succeed in the defense that the proceeding by injunction is an attempt to enforce a criminal law by civil process, demands, in effect, that the Court must establish the principle that, because the nuisance complained of is a crime, it is entitled to favor and protection in a Court of Equity. There are many adjudged cases which expressly hold that the fact that a nuisance is a crime, and punishable as such, does not deprive equity of its jurisdiction to restrain and abate it by injunction. See, also, *Carleton v. Rugg*, 149 Mass., 550 (5 L. R. A., 193); *Attorney-general v. Hunter*, 1 Dev. Eq., 12; *People v. St. Louis*, 10 Ill., 351, 367; *Ewell v. Greenwood*, 26 Iowa, 377; *Minke v. Hopeman*, 87 Ill., 450, 453, 454. Of course, as already stated, before a private person can proceed, he must show some special injury to his person or property, and, further, it is true, that where the proceeding in equity is based merely on the ground that the nuisance is a public one, the proper proceeding is by information by the Attorney-general. *New Aqueduct Board v. Passaic*, 45 N. J. Eq., 393; *Georgetown v. Alexandria Canal Co.*, 12 Peters, 91, 98. As to the limits of this latter power we are

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not now concerned, but cite the last two cases merely upon the point that equity is not deprived of its jurisdiction to abate nuisances, either public or private, by the fact that the perpetrators of such nuisance are also amenable to the Criminal Court.

“Applying the above principles to the case in hand, we are of the opinion that the Chancery Court had jurisdiction to abate this nuisance, and should have done so. That it is a nuisance by statute (Shannon’s Code, § 6870) and at Common Law (Bacon’s Ab., title Nuisance, A) is undoubted; that the inmates of this house were very noisy and boisterous, and were constantly guilty of the exposure of their persons at the windows of the house and outside porches, within view of the adjoining houses, including that of the complainant, is established by the facts above found; that complainant has also suffered injury special to himself in the great deterioration of his rents on account of this nuisance, and that his buildings, fitted up not only for business houses, but also for the occupation of families in the upper stories of them, have also been very greatly impaired for comfortable enjoyment and occupation by decent people, and that the complainant is thereby especially and particularly injured in the use of his property by the existence and maintenance of this nuisance, is also shown by the facts found. It is urged in behalf of the defendants that the complainant does not himself live in either one of his houses on College Street, but in a distant

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part of the city. This is true, but immaterial. The complainant had not only the right to use the the lower floor of his buildings for stores, but an equal right to use the upper floors or stories as dwellings for those who might occupy the store-rooms, or for others. The defendants, by maintaining this nuisance, had no right to impair the complainant's use of his property for either of these lawful purposes.

“We think there is no force whatever in the point that the complainant himself must dwell in the adjacent property. There seems to us to be no reason in the distinction. If he has the right to protect his own dwelling, he has also the right to protect that of his tenants, and hence his property intended for tenants. If this were not true, while the tenants could always protect themselves by moving away, the landlord would be compelled to see his property go to ruin, while the Court of Equity would be powerless to help him. We have already shown that, with regard to both public and private nuisances, where an individual is affected seriously thereby, the jurisdiction of the Court of Equity is ample to afford him relief by injunction. To recur, then, to the thought we were considering a moment ago, we say there is no sound distinction, in applying the relief which equity affords, to say that it will be given for the protection of a man's individual dwelling, but not for a house which he intends as a dwelling for his tenants and

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which is devoted to that purpose. Nor indeed do we think that the relief should be confined merely to dwellings. While it may be true, as stated in Section 769 of High on Injunctions, that 'an injunction will be denied against the perpetration [of a nuisance] prohibited by public statute, the only ground urged for the relief being diminution of the profits of a trade or business pursued by complainant in common with others,' it is not true that equity would deny relief to one who is deprived of the comfortable enjoyment of his property, and which property is greatly diminished in value by reason of a nuisance maintained on neighboring property, even though the property injured is used only for business purposes. Of course a Court of Equity would find an injury to exist and grant relief under much slighter circumstances in favor of a dwelling than in favor of a business house. The distinction is dictated by the different uses to which the property is put. We think, however, such noise and such indecent exhibitions as this proof shows would be intolerable even to the owners and occupiers of business houses, special injury being the true ground of relief, and that being shown in this case as to both stores and dwelling rooms.

"On the grounds stated, we are of opinion that the Chancellor was in error in dismissing the bill. A decree should have been entered by the Chancellor ordering the nuisance to be abated, and the injunction against its maintenance should be made perpetual.

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The cause will be remanded to the Chancery Court, to the end that the proper decrees may be entered abating the nuisance and making the injunction perpetual.

“The defendants will pay the costs of this Court and of the Court below accrued up to the present time. Further costs in the Court below will be paid as may be decreed by the Chancellor.

“All the Judges concur.

“M. M. NEIL, *Judge.*”

Upon the grounds and for the reasons so well stated by the Court of Chancery Appeals, we approve its conclusion and adopt its opinion as our own. Let the decree be affirmed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE

FOR THE

WESTERN DIVISION.

JACKSON, APRIL TERM, 1899.

PERSICA v. MAYDWELL.

(Jackson. April 8, 1899.)

1. LANDLORD AND TENANT. *Wife becomes tenant, when.*

The wife becomes tenant, and liable for the rent of a storehouse in which her husband had conducted a mercantile business, where, after expiration of the husband's lease of the house, she purchased his business and continued to occupy the house on her own account, and made some payments on the rent.

2. COVERTURE. *Not available as a plea, when.*

Since the enactment of Ch. 82, Acts 1897, a married woman cannot successfully plead her coverture to defeat judgment for a debt contracted by her in the conduct of a mercantile or

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manufacturing business—*e. g.*, a debt for the rent of a storehouse in which to carry on a mercantile business.

Act construed: Acts 1897, Ch. 82.

FROM SHELBY.

Appeal from the Circuit Court of Shelby County.
J. S. GALLOWAY, J.

J. W. DURHAM for Persica.

R. LEE BARTELS and JAS. H. MALONE for Maydwell.

McFARLAND, Sp. J. The plaintiff in error, John Persica, leased two storehouses from Mrs. Sopha Maydwell—Nos. 56 and 58 Hernando Street—under written lease from November 1, 1893, to October 31, 1894, at a rental of \$112.56 per month. At expiration of this lease, Persica still remained in the houses, but refused to execute a new lease. The rent was reduced to \$100 per month. In August, 1897, Persica turned the store and business over to his wife, and she took out license from the city in her own name, and continued this business in these houses until May 8, 1898, when they moved out. After Mrs. Persica took possession they continued to pay the rent, Mrs. Persica generally paying, and

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Mrs. Maydwell testified that at one time she, Mrs. Persica, paid this rent by her own check on the Continental National Bank. This is denied by Persica and wife, who say the wife had no bank account. Mrs. Maydwell would make out these rent receipts before going to stores, and the four which were not paid were to John Persica.

Mrs. Maydwell further testified that in February, 1898, she told Mrs. Persica she, Mrs. Maydwell, would look to her, Mrs. Persica, for the rent after that. This is denied by Mrs. Persica. No rent was paid for the months of April or May, 1898, and upon this, Persica moving out on May 8, 1898, this suit was brought against both Persica and wife for two months' rent. The wife filed a plea of coverture. Judgment for plaintiff before the Justice, appealed to Circuit Court, trial by jury, with verdict and judgment for the plaintiff.

Mrs. Persica assigns as error the action of the Court in not sustaining her plea of coverture. There is no question in this case but that the husband transferred these stores and his business to his wife; that she carried on this business in her own name in these stores, after the expiration of the two years' lease made to her husband, paying rent therefor several months, and then left the house, leaving two months unpaid. These facts are sufficient for this Court to affirm a verdict and judgment which compels the payment of this debt, unless prevented by some clear legal rule or principle.

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The Act of 1897, Chapter 82, was passed to enable Courts to compel the payment of just such debts. It is in these words: "SECTION 1. *Be it enacted, etc.*, That when married women are engaged in the mercantile or manufacturing business, in their own names, or by an agent, or as partner, they shall be liable for the debts incurred in the conduct of such business as if they were *feme sole*, and no plea of coverture shall avail in such cases."

Aside from an express leasing, or even promise to pay, we think the occupation by one person of another's property carries with it an implied promise to pay rent. Besides, here the plaintiff testifies that Mrs. Persica, the actual tenant, paid several months' rent, and was notified, in substance, that she would be looked to, as tenant, to pay the rent. She remained in possession of the premises and paid rent after this. This was sufficient, if believed by the jury, to justify a verdict for plaintiff. The jury found a verdict for the plaintiff, which the Court sustained, and this Court will not disturb it. Let it be affirmed, with costs.

Cooper v. Overton.

COOPER v. OVERTON.

*(Jackson. April 12, 1899.)*1. NEGLIGENCE. *Drowning of boy in pond.*

A pond on an unfenced city lot, not being dangerously near a street, the premises of adjoining lot owner, nor possessing any other peculiar features attractive to children than a plank or small raft floating on its surface, and formed, only occasionally, by surface water dammed up by the obstruction of a natural drain by the city authorities, without the agency or knowledge of the owner, who was ignorant of the existence of the pond, although his agents inspected the premises with sufficient frequency, does not constitute negligence, although the pond is situated near numerous attended schools and within a few blocks of a thickly populated district of the city, that will render the owner liable for the drowning of a ten-year-old boy while playing with the plank or raft on the pond. (*Post*, pp. 212-240.)

2. SAME. *Liability of owner of dangerous premises to trespassers defined.*

The liability of the owner of dangerous premises to trespassers does not exist even in the case of children, unless they are induced to enter on the land by something unusual and attractive placed on it by the owner, or with his knowledge permitted to remain thereon. (*Post*, p. 237.)

3. EVIDENCE. *Opinions.*

Opinions of witnesses as to what attracts children to water, or as to whether or not boys like to ride on a plank in the water, are not admissible. (*Post*, pp. 239, 240.)

FROM SHELBY.

Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

Cooper v. Overton.

GILLHAM & GILLHAM for Cooper.

TURLEY & WRIGHT for Overton.

WILKES, J. This is an action for damages for the drowning of Oscar Cooper, the son of plaintiff, Wm. H. Cooper, the father being the administrator of the son. It is conceded that there is no cause of action against Jno. Overton, trustee, and as to him the action is dismissed. There was a verdict and judgment for defendant, and an appeal by plaintiff, as administrator, and he has assigned errors.

The facts, so far as necessary to be stated, are that Oscar Cooper, a boy about ten years of age, was drowned by falling from a plank upon which he was attempting to float upon a pond of water upon a lot owned by defendant, Jesse M. Overton, in Memphis, Tenn. Overton is a resident of Nashville, Tenn., and is the owner and in possession of lots Nos. 48 to 53 of block 24, in the tenth ward of Memphis. These lots front about $148\frac{1}{2}$ feet on the east line, and about 400 feet on the north line of Clay Street. They had descended to him from his grandfather. They were unimproved, unfenced, and uninclosed. The property had no other than natural drainage. The lot adjoining these lots is separated from them by a fence, and on it there is a house, about 150 feet from the line of the lots. There are no other houses in the immediate vicinity of these lots, but they are located within a few blocks of a somewhat thickly populated part of the

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city. About 450 feet northwest of these lots is a public school building, usually attended by about 370 pupils, and there is a Catholic parish school a few blocks south. This property was looked after by Overton & Overton, real estate agents, for the owner, Jesse M., who rarely visited Memphis. Surface water from contiguous property flowed across these lots, and gradually cut a gully of several feet deep, through which it found vent. The city, it appears without the knowledge of the owner or his agent, filled up the lower end of this drain by dumping trash and dirt into it, so as to form a dam and cause a pond of water to form or accumulate on the lot. The edge of this pond was about 50 feet from a sidewalk on Lee Street, and 150 feet from the sidewalk on Clay Street. It appears from the statements in the record that Overton & Overton, agents, were in the habit of inspecting the premises about twice a month, and when last inspected there was no pond upon them, and it is further stated that they had no knowledge there was a pond upon the lot until after the drowning, which occurred January 10, 1899.

It further appears that the pond would form after a heavy rain, and in a short time would dry up and disappear, and at this time there had been a heavy rain for two days. When notified of the accident, Mr. Overton went to the city authorities and complained of their action in stopping the drain, and the city at once removed the dam and filled

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up the pond. On both sides of this property defendant, Overton, had caused sidewalks to be laid, and the pond was about fifty feet from the nearest point of the sidewalk. There appears also to have been a path or walkway across the lot, which was used by a few persons as a cut-off instead of going around the sidewalks, but the public was not in the habit of using it. Its nearest point to the pond was about twenty-five feet. It does not appear that the owner or his agent had ever given any permission to the public to use a pathway across their lots or that they knew of such use.

The deceased was a pupil in the public school, and is shown to have been a boy of average intelligence. It appears that the school children had been playing in a bayou which crossed these lots. They had been forbidden (and the intestate with the others) from going on these lots by the principal, and, as a rule, these instructions had been obeyed. The deceased, however, with another boy, John Apple, aged about eleven years, and a younger brother of the latter, went over this lot from the sidewalk, about fifty feet to the edge of the pond. A piece of the plank sidewalk had been torn up and thrown on the water of the pond, by whom does not appear, and appears to have been the only one on the surface of the water. Oscar Cooper got upon this plank and attempted to propel it around the pond over the water with a stick. He lost his balance and fell off the plank into deep

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water and was drowned. It appears that the two Appling boys declined to get on the plank (deeming it dangerous), though invited to do so by young Cooper. It appears that other children had been playing at or in this pond, sometimes bathing and swimming, but whether school children or not does not appear. It is not shown that the pond had any special attraction for boys, but some testimony tending in that direction was excluded, and forms the basis of a part of the assignments.

There was no danger to anyone on or using the sidewalks. There is testimony tending to show that there was no pond there in the summer, and that it was only formed by heavy rainfalls and would soon dry up. When the pond was full it would extend up to and under the sidewalk of Clay Street, but was shallow at that point and generally around the margin of the pond.

Various assignments of error are made, principally to the failure of the trial Judge to give certain requests asked by plaintiff's counsel and to the charge as given by him. The first and second assignments will be treated together, and are refusals to charge as follows:

"1. The Court instructs you that it is the duty of all owners of property situated in the city, or where many people live or travel, to take such reasonable care of the same as will render it reasonably safe to the public.

"2. It is the duty of all such property owners

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to abate any dangerous nuisance which may arise on their premises, and it is his duty to look after his property, and if a nuisance has existed for a considerable time he is in law presumed to know it, and then it becomes his duty to abate it.”

Without stopping to comment on these requests, which we think are too general and meager in terms, we think the trial Judge in his general charge more correctly stated the law applicable to the facts of this case and in much better language, as follows: “An actionable nuisance is anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal right. This necessarily carries you to determining what Oscar Cooper’s legal rights were. He had a legal right to pass over and along either Clay or Lea Street in safety. These were the streets that bounded the lots upon which it is claimed the pond was. Defendant, Overton, had no right to construct, maintain, or permit a pond upon his lots so near to the streets which bounded the lots as to make it dangerous to persons who were using the streets. So, if you find from the evidence that the pond was so near to the streets which bounded the lots as to endanger anyone who was using the streets, and, as a consequence thereof, Oscar Cooper was drowned, then the plaintiff can recover.”

The third assignment is that the trial Judge refused to charge a request, as follows: “If a pond should form upon the vacant property of the owner, situated in the populous districts of a city, and near

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streets or public schools where many children attend, and which pond is deep enough to drown a child, it is the duty of the owner to abate the nuisance, to drain or fill up the pond." This assignment will be considered with the fourth and fifth, which raise the question of the correctness of the trial Judge's charge, as a whole, upon the duties of the landowner and the rights of the public.

The Judge charged as follows: "The pleading of defendant, Overton, puts upon plaintiff, Cooper, the burden of making out his case upon every material point by a preponderance of the evidence. The material points upon which the evidence must preponderate before it authorizes the jury to give plaintiff a verdict are the following: (1) he must establish the fact that a pond was maintained or permitted to exist upon defendant's lots; (2) that the manner or condition in which it was maintained or permitted to exist was negligence in itself; (3) that it was because of its condition, or the negligent manner in which it was maintained or permitted, that Oscar Cooper was attracted to it and was drowned. Unless these three points are established by a preponderance of the evidence there can be no recovery. An actionable nuisance is anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights. This necessarily carries you to determining what Oscar Cooper's legal rights were. He had a legal right to pass over and along either Lea or Clay Streets in safety.

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These were the streets that bounded the lots upon which it is claimed the pond was. Defendant, Overton, had no right to construct, maintain, or permit a pond upon his lots so near to the streets which bounded the lots as to make it dangerous to persons who were using the streets. So that, if you find, from the evidence, that the pond was so near to the street that it endangered anyone who might be using the street, and, as a consequence thereof, Oscar Cooper was drowned, the plaintiff can recover. On the other hand, if you find from the evidence that Oscar Cooper had to leave the sidewalk and go over on the private property of Overton, thirty feet or more, before he came to a place of danger in the pond, then there can be no recovery in this case from the bare fact of maintaining or permitting a pond to remain on the lot, for the reason that every owner of real estate has the right to use his property just as he pleases, so long as the use which he makes of it does not endanger anyone else in the enjoyment of their legal rights; and if any owner of real estate has a right to use his property just as he pleases, you can see that such owner has the right, if he so desires, to dig a pond on his lot. The only restriction which the law imposes upon this right is this, that the owner, in digging the pond, must see to it that he does not put it near enough to an adjoining lot owner to endanger the use of his property, and that he does not dig it near enough to a public street to

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make it dangerous to persons using the street. When the lot owner has observed these precautions in digging or maintaining a pond on his lot, he has complied with the law, and no one can legally complain; if he has not observed the precautions just mentioned, and injury results to anyone as a consequence of the owner's failing to observe them, the injured person can recover."

It will be noted that neither in the charge nor the requests is the idea prominently presented that this pond was or might be a place attractive to children, but the requests are based upon the idea that there is an obligation resting on the landowner to keep his premises near a public school or highway free from dangers which arise from natural or artificial causes. This feature of attractiveness of the pond was made prominent in the declaration, and some proof was attempted to be introduced upon it, but was rejected so far as based on opinion. It is, however, pressed in argument, and will be considered along with the other features of the case.

As to this feature of attractiveness, the record presents the following state of facts: Miss Conway, the principal of the school, testifies that some boys had been reported to her as having skated on ice over Overton's lots, and she had forbidden the little boys from going to the bayou to play, because they would get their feet muddy. She had never known that the children of the school had been in the habit of playing on it.

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Wall, the janitor, says he has seen children come into school and had to strip them; that they had fallen in and come out, but that he did not know of any of the school children playing there except from hearsay; that he had to run some children out who were swimming there, but not at the time of the year (February) when this drowning occurred. He had seen some children playing on some planks in the pond, but when this was is not stated. His evidence is largely, if not altogether, hearsay, and is not at all definite.

The case has been very elaborately and ably argued by learned counsel, and we have been furnished with exhaustive printed briefs on each side, and very full citation of authorities. The plaintiff insists that the merits of the controversy are embodied in his third request, and he specially relies upon several cases which we will notice.

The first is the case of *Pekin v. McMahon*, 154 Ill., 141 (S. C., 27 L. R. A., 206; 39 N. E. Rep., 484, and 45 Am. St. Rep., 114). In that case the Court says: "There is a conflict in the decisions upon this subject, some Courts holding in favor of the liability of the owner, and others ruling against it." It then proceeds to lay down the rule as follows: "When the land of a private owner is in a thickly settled portion of the city, adjacent to a public street or alley, and he has upon it, or suffers to be upon it, dangerous machinery or a dangerous pit or pond of water, or any other dangerous

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agency, at a point thereon near such public street or alley, of such a character as to be attractive to children of tender years incapable of exercising ordinary care, and he is aware or has notice of its attractions for children of that class, we think that he is under obligations to use reasonable care to protect them from injury when coming upon such premises, even though they may be technical trespassers."

And, again, the case quotes with approval the statement made in *Shearman & Redfield on Negligence*, as follows: "The owner of land where children are allowed or accustomed to play, particularly if it is unfenced, must use ordinary care to keep it in safe condition, for they, being without judgment, and likely to be drawn by childish curiosity into places of danger, are not to be classed with trespassers, idlers, and mere licensees." Citing 2 *Shearman & Redfield on Negligence*, 4th Ed., Sec. 705; 4 *Am. & Eng. Enc. L.*, p. 53 and notes. In such case the owner would reasonably anticipate the injury which had happened. 1 *Thompson on Negligence*, 304.

In the *Pekin* case there was a pond or pit of water, five to fourteen feet deep, in a populous city, on lots belonging to the city and filled with logs and timber floating therein, on which children were in the habit of playing, near a driveway across vacant lots, but partially inclosed, and the city had been notified that it was dangerous, and requested to remove it,

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but had allowed it to remain a year until a boy eight and one-half years of age went through an opening on the causeway, stepped on a log in the water, which rolled and threw him into the water.

The case of *Price v. Atchison Water Co.*, 58 Kan., 551 (S. C., 62 Am. St. Rep., 625), is also relied on by plaintiff. In that case a landlord maintained on his premises a reservoir filled with water, to which children were attracted for fishing and other sports, which was well known to the landlord, and who took no means to warn them or exclude them, and a child eleven years of age was attracted to the place and fell in and was drowned, and it was held the landlord was liable. The case turned upon the allurements and enticement held out to children, and the knowledge of the owner of its danger, and that children did frequent it habitually. To the same effect are cited *Brinkly Car Co. v. Cooper*, 60 Ark., 545 (S. C., 46 Am. St. Rep., 216), and a number of other cases, more or less in point, and holding the same general doctrine.

On the other hand, counsel for defendants call the attention of the Court to a number of well-considered cases, more or less in conflict with the cases cited for plaintiff, only a few of which we refer to as illustrating defendants' contention.

The case of *Richards v. Conwell*, 45 Neb., 467, is where a demurrer was sustained to a petition which set out facts almost identical with the facts in the present case. The statements in the petition

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were that "on the twenty-ninth day of June, 1891, and for a long time prior thereto, the defendant was the owner of lots 40 and 41 in the city of Omaha, and the plaintiff's father was, during said time, the owner of the adjoining premises, described as lot 59; that defendants had, for a long time prior to the date named, negligently permitted the surface water to accumulate on said lots, thereby creating a deep and dangerous pond; that they had failed and neglected to fence said lot, or to erect barriers of any kind to prevent children, lawfully in the vicinity thereof, from falling into said pond; that said lots are situated in the vicinity of one of the public schools of said city, and the pond is not only dangerous to persons passing along South Street adjacent thereto, but is situated in a public and much frequented place, and attractive to children of tender age, many of whom are accustomed to play about and upon the water; that on June 29, 1891, plaintiff's intestate, a boy ten years of age, yielding to the natural impulses of childhood, went on said pond upon a section of wooden sidewalk floating thereon, from which he fell into said pond and was drowned."

The Court, in passing on the demurrer, said: "The petition, we think, fails to state a cause of action against the defendant; the demurrer was, therefore, rightly sustained. The single question presented by the record is whether the owner of a vacant lot, upon which is situated a pond of water

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or dangerous excavation, is required to fence it, or otherwise insure the safety of strangers, old or young, who may go upon said premises, not by his invitation, expressed or implied, but for purposes of amusement or from motives of curiosity. The authorities we find to be in substantial accord, and sustain the proposition that, independent of statute, no such duty exists.”

The case of *Klicks v. Nieman*, 68 Wis., 273, is very similar to the one at bar. That case was also decided on demurrer, and the Court said: “We think the demurrer in this case was properly sustained, for the reason that the complaint shows no actionable negligence on the part of the defendant. The complainant states that the defendant was the owner of and in the possession of a lot in the city of Milwaukee, situated on the northeast corner of Hubbard and Loyd Streets; that the lot was in a thickly populated part of the city, and was not inclosed by a fence between it and Hubbard Street or on the side between it and Loyd Street, but that the lot was vacant and open, so that the public had free and unrestricted access thereto from both Hubbard and Loyd Streets; that for a long time prior to September 5, 1885, there had been upon the lot a deep and dangerous hole or excavation, partially filled with water, making a pond which covered about the entire surface; that the water of the pond was oily, so that its depth could not be ascertained only by measurement, but that in places it was of the depth

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of nine feet, so that the pond was dangerous to the lives of children who might be attracted thereto for amusement or otherwise; that the defendant, well knowing the pond was dangerous to the lives of children residing in the vicinity of the same, wrongfully, negligently, and carelessly permitted it to remain unguarded by fence or barricade, and the plaintiff's son, a lad of nine years of age, while playing upon or about said pond of water, being induced thereto by reason of the unguarded and unprotected condition of said pond, fell, or was precipitated, into the same, and was drowned. It will be observed," says the Court, "that it was not alleged that the pond was so near the highway as to make it unsafe for persons going along the street or sidewalk, and no averment that the boy, when he fell into the pond, was passing along the street or sidewalk. On the contrary, it is stated that the boy was playing upon and around the pond when he was precipitated into the water and drowned. So, the single question presented is, was it the duty of the defendant to fence or guard this hole or excavation on his lot, which it does not appear he made or caused to be made, where surface water collected, in order to secure the safety of strangers, young or old, who might go upon it or about the pond for play or curiosity? If the defendant was bound to fence or guard the pond, upon what principle or ground does this obligation exist? There can be no liability unless it was his duty to fence

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the pond. It surely is not the duty of an owner to guard or fence every dangerous hole or pond or stream of water on his premises for the protection of persons going upon his land who have no right to go there. No such rule of law is laid down in the books, and it would be most unreasonable to so hold. A learned authority states the doctrine in these words: 'An owner of land is under no obligation to fence an excavation on his land unless it is so near the highway as to amount to a public nuisance, and if persons or animals are killed or injured in consequence of his failure to do so, no damages can be recovered.'

"The qualification of this rule is that when the owner of land, expressly or by implication, invites a person to come upon it, he will be liable for damages if he permit anything in the nature of a snare to exist thereon which results in injury to such person, the latter being at the time in the exercise of ordinary care. If, however, he gives a bare license or permission to cross his premises, the licensee takes the risk of accident in using the premises in the condition in which they are. Quoting from 1 Thompson on Negligence, 361: 'Among other authorities cited by the administrator to sustain this doctrine, is *Hardcastle v. Railroad*, 4 Hurl. & Nor., 67, where Pollock, C. B., uses this language: "When an excavation is made adjoining a public highway, so that a person walking upon it might, by making a false step, or being affected

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with sudden giddiness, or in the case of a horse or carriage that might, by a sudden starting of the horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences. But when the excavation is made at some distance from the highway, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to be different. We do not see where the liability is to stop. A man getting off the road on a dark night and losing his way may wander to any extent. And if the question be for the jury, no one could tell whether he was liable for the consequences of his act upon his own land or not.'''

In *Shearman & Redfield on Negligence* (5th Ed.), sec. 705, it is said: "The owner of land where children are allowed or accustomed to play, must use ordinary care to keep it in a safe condition. And, yet, merely allowing children to play upon a vacant lot is held not to amount to an invitation which creates liability for its condition." Citing a large number of cases, and among them *Moran v. Pullman Co.*, 134 Mo., 641 (S. C., 33 L. R. A., 755). In the syllabus of this case this language is used: "The owner of a lot in a city who failed to fence the same is not liable in damages for the death of a boy who entered upon the premises without invitation or permission, and was drowned while bathing in a pond on the lot." There was a judgment in favor of the defendant in this case, just as in the case

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at bar, and the same argument was made by counsel for appellants in that case as is made here. Thus, on page 642 we find appellant's counsel making this contention: First, the owner of the property having thereon any dangerous agency which is attractive to children, or where he has knowledge that they resort to it for amusement or otherwise, and fails to use ordinary care, under the circumstances, to guard the same against injury, must respond in damages for such neglect, irrespective of the fact that the danger is not adjacent to the highway. Quoting *Pekin v. McMahon*, 15 Ill., 141; *McKie v. Vicksburg*, 64 Miss., 777; also 81 Ky., 638, and a long list of authorities cited by opposing counsel in case at bar.

The opinion in the late Missouri case, however, after stating the facts, which are much more favorable to the plaintiff than the facts in the case at bar, since the pond is shown to have been only twenty feet away from a public street and in a populous part of the city, uses this language: "The views expressed in *Overholt v. Bieths* are applicable to the case at bar, and are not rendered inapplicable by the fact that the child entered on the premises where he was drowned through adjoining private property. The same principle applies, whether the unauthorized entry be made on private grounds as where a public street is used for the like purpose." Overholt's case has been recently and approvingly cited and followed in the quite recent cases of *Witte v. Stifel*, 126 Mo., 295, and *Barney v. Railroad*,

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126 Mo., 372; 26 L. R. A., 847. Having fully discussed in these cases the subject here involved, it is needless to go over the same ground again. Abundant authorities, in addition to those just mentioned, have been collected by the industry of counsel, which as fully maintain these views as those already mentioned.

The case of *Richards v. Connell* was decided last year by the Supreme Court of Nebraska. The facts in that case are almost identical with those in this case. The action there, as here, was against the city of Omaha and the owners of certain uninclosed lots of ground. The petition there alleged that defendants had, for a long time prior to the death by drowning of a boy of about ten years of age, permitted the surface water to accumulate on the lots, thereby creating a deep and dangerous pond, and that defendants had failed and neglected to fence the lots or erect any barrier to prevent children, lawfully in the vicinity, from falling into the pond; that the lots were in the vicinity of a public school, and adjacent to a street, and in a place much frequented and attractive to children of tender years, who were accustomed to play about and upon the water. The boy was playing upon a raft floating upon the water, and fell in and was drowned. The case also approvingly cites and follows the *Overholt* case, 93 Mo., and distinguishes the facts treated in that case from what is commonly known as the turntable cases. To the like effect see *Ratte*

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v. *Dawson*, 52 N. W. Rep., 565; 91 Mich., 59; *Murphy v. Brooklyn*, 118 N. Y., 575; *Clark v. Manchester*, 52 N. H., 577; *Frost v. Railroad*, 9 Atl. Rep., 790; *O'Connor v. Railroad*, 44 La. Ann., 339; *Benson v. Railroad*, 26 Atl. Rep., 973; *Clark v. Richmond*, 83 Va., 355, and other cases.

The case of *Witte v. Stifel*, 126 Mo., 295, holds as follows: "The owner of a building in process of construction in a city is not liable for injuries to a child playing thereat without his knowledge, and without any inducement or invitation, implied or otherwise, on his part to a child to go upon the premises. Plaintiff's son, seven years of age, went to one of the cellar windows of a building in process of construction in the city of St. Louis, which was about three feet from the street line, and sought to draw himself up by taking hold of a stone placed across the top of the window frame. The stone was not fastened, and fell and killed him. It did not appear that the owner of the building, a contractor, knew of the dangerous position of the stone, or that children were in the habit of playing around the building. Held, that deceased was a trespasser, and that no inducement or invitation, implied or otherwise, having been held out to him to enter upon the premises, there could be no recovery for his death."

In the case of *Murphy v. City of Brooklyn*, 118 N. Y., 575, this language is used: "This action was brought to recover damages for the death of

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plaintiff's intestate, a boy six years old, who was found drowned in a hole alongside a sewer constructed by defendant through private property and then into the street, with the consent of the owner. It appeared that the sewer emptied into the bay. At high tide the sewerage was driven back up the sewer, causing the cavity in question. This was about fifty feet from one of defendant's streets, along which, forming the boundary of the adjoining premises, was an embankment faced by a wall, and on the top of this a fence or railing of posts and cross-bars. At a point where it was supposed the plaintiff's intestate went upon the premises a crossbar was down—the wall had given way. People going to the bay had occasionally crossed there, and the ground for ten or twelve feet from the fence had the appearance of a path. It did not appear that any objection had been made by any person to the construction and maintenance of the sewer. Held, that no violation of any duty which the defendant owed to the deceased had been shown, and so it was not liable. The construction of the sewer was not wrongful, nor was its maintenance a nuisance; the defendant owed to him no duty of care to protect him while upon the premises, or to guard the hole, as it was not so close to the street as to make the latter unsafe; it seems that the owner of the premises could not have been charged with negligence in permitting the hole to remain, distinguishing *Beck v. Carter*, 68 N. Y., 283; quoting

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with approval *Hargraves v. Deacon*, *Blythe v. Topham*, *Hardcastle v. Railroad*, and many other authorities.”

In the case of *Hargraves v. Deacon*, 25 Mich., 1, the rule is laid down as follows: “Owners of private property are not responsible for injuries caused by leaving a dangerous place unguarded, when the person injured was not on the premises by permission or on business or other lawful occasion, and had no right to be there. Where an injury arises to a person from the neglect of one doing his lawful business in a lawful way, to provide against accident, the question arises at once whether he was under any obligation to look out for the protection of that particular person under the particular circumstances of the case, for the law does not require vigilance in all cases, or in behalf of all persons. If on the sidewalk, the duty of protection extends to all persons who have a legal right to go there; or, in other words, to the whole public, and it depends upon that right. On private property, not open of right to the public, it applies less generally, and only to those who have a legal right to go there and claim the care of the occupant for their security while on the premises against negligence, or to those who are directly injured by some positive act involving more than passive negligence. We have found no cases which hold that an accident from negligence on private premises can be made a ground of damages, unless the party injured

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had been induced to come by invitation, or by employment which brings them there, or by resorting there as to a place of business, or a general resort held out as open to customers or others, when lawful occasion may lead them to visit there. We have found no support for any rule which would protect those who go where they are not invited, but merely from motives of convenience in no way connected with business or other relations with the occupant." In that case a little child of tender years had strayed upon the property of defendants, and had fallen into a pond which was open and unguarded.

In *Ratte v. Dawson*, 50 Minn., 450, this language is used: "Where a child of tender years was taken by an older sister, to whose care it was intrusted, to a vacant lot in a city for recreation and pleasure, and was accidentally knocked down and killed by the caving in of an embankment caused by excavations for sand, and which had been left unfenced, it was held that the landowner was not liable in damages, and that he owed no duty to persons coming upon the premises without his invitation to protect them from danger from excavations therein." The Court uses this language: "There is nothing to take the case out of the general rule that where the owner of land, in the exercise of his lawful dominion over it, makes an excavation therein so far from the street that a person coming on to the land without his invitation, and falling into it, would be a tres-

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passer before reaching it, such owner is not liable in an action for injuries sustained. There was nothing in the nature of the excavation, or anything kept or used there, which can be said to have been specially inviting or attractive to children, or calculated to entrap them into danger, so as to bring the case under the rule established in the turntable cases. The maxim '*sic utere tuo*' has no application to such a case; it refers to acts the effect of which extend beyond the limits of the property, and to neighbors who do not interfere with or enter upon it. If the rule were otherwise, the landowner could not sink a well, or dig a ditch, or open a stone quarry on his land, except at risk of being made liable for the consequential damages, which would unreasonably restrict its enjoyment."

In *Peters v. Bowman*, 115 Cal., 345 (S. C., 56 Am. St. Rep., 106), we have a case very similar to the one at bar: "Plaintiff brought an action for damages for the death of his infant son drowned in a pond of water upon a lot owned by the defendant. The water used to run over the lot until the street was graded by the city of San Francisco on the side towards which the land sloped, since which time the water accumulated in the rainy seasons, forming a pond which disappeared during the dry season. The boy was drowned while playing on a raft that was floating in the pond, and was eleven years of age. The general rule is that the owner of land is under no obligation to keep his premises

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safe for trespassers, whether children or adults, and governs this case.”

The rule of turntable cases is not applicable. That rule is approved in that State (see 91 Cal., 296), but should not be carried beyond the class of cases to which it has been applied. It has been repeatedly held that damages cannot be recovered for the death of a child drowned in a pond on private premises who had gone there without invitation, quoting *Klicks v. Nieman*, 68 Wis., 271; *Overholt v. Bieths*, 93 Mo., 422; *Hargraves v. Deacon*, 25 Mich., 1; *Gillespie v. McGowan*, 100 Pa. St., 144; *Richards v. Connell*, 45 Neb., 467.

In response to a petition to rehear, the Court entered very fully into the distinction between the case and the turntable cases, and showed to what absurdities the doctrine that the landowner is liable for injuries to children who are attracted on to his premises, by instancing the case of the death of a child who, attracted by the tempting fruit, climbs into a tree and falls and is killed.

The Court says: “With respect to danger especially created by the act of the owner, novel in character, attractive and dangerous to children, easily guarded and rendered safe, the rule is, as it ought to be, different from where the danger exists naturally and arises from natural causes. It distinguishes the Illinois case of *Pekin v. McMahon*, *supra*, by showing that it was one where the city had made the dangerous excavation in a thickly peopled quarter,

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while in the case under consideration the pond on the owner's land [as in this case] was created by the city without any fault on his part [and in this case without defendant's knowledge]."

There is a late case decided by the Supreme Court of Minnesota, in July, 1898, which is directly in point. This is the case of *Dehanetz v. City of St. Paul*, quoted in 4 Am. Neg. Repts., 655. The syllabus is as follows: "Within the limits of the city of St. Paul, and between the banks of the Mississippi, is a slough more than a quarter of a mile in length, which, during high water, fills with water, and has no outlet. In this slough is an open basin from sixty to seventy feet across, which is contiguous to James Street. For a long time the city of St. Paul has used this hollow basin as a place for dumping garbage, and during high water it floats upon the water, and forms a crust, upon which grows vegetation similar to that upon the surrounding land. The plaintiff's intestate, a girl ten years old, left James Street, upon which she had been traveling, and, either for convenience or pleasure, attempted to cross over this crust. From the facts, it did not appear that the public had ever traveled over this dumping ground or used it as an open common. Held, that the city owed no duty of protection or warning to those going over this dumping ground or crust, and, hence, was not liable for her death."

The opinion in this case concludes as follows:

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“However sad may be the untimely death of this young girl, yet, under the facts and well-settled rules of law, the order denying the defendant’s motion for a new trial must be overruled. We have not deemed it necessary to discuss the authorities cited by either counsel, as the facts clearly demand a reversal of the order. It is sufficient to say that the rule laid down in the well-known turntable cases has no application to the case at bar.”

It will be seen that the authorities cited are in direct conflict upon what may be said to be the real issue in this case, but we hold, upon reason and weight of authority, that liability does not exist even in the case of children, unless they are induced to enter upon the land by something unusual and attractive placed upon it by the owner, or with his knowledge, permitted to remain there, and this is the doctrine of the turntable cases. Further than this the facts in this case do not warrant us in going.

In the case at bar the proof wholly fails to show that the owner of this property caused the water to stand upon this lot in a pond, but this was done by the city. It wholly fails to show that the owner, or his agents, did anything to render the pond attractive, or that they placed any planks upon it, and the proof does show affirmatively that the owner did not know of the existence of the pond, or its dangerous character, and that he also, through his agents, looked after the property with as much diligence as should be required. It is impossible, there-

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fore, upon any theory of the case, to find a ground of liability of the defendant. The leading cases relied on by plaintiff, cited above, have, as an important and essential feature fixing liability, the creation of the danger or actual knowledge of it by the owner, neither of which features exist in this case.

In *LaGrill v. Clapp*, decided at the present term, it was held that if the premises were rendered dangerous by the acts of a third person, and the owner had no knowledge of it and could not have known it by proper diligence, the owner would not be liable for injuries from the defects.

We have treated the case as though the special requests were made as the rule requires, but the record shows they were made before the main charge was delivered, and hence, under our rule, they could not be held as properly made. Still, the entire question is raised by objection to the charge as given, and we have used the requests the more plainly to define the plaintiff's contention.

There are various errors assigned in the record, but not argued before the Court, which we dispose of briefly. The testimony of Miss Conway was objected to so far as it sought to have her state the age of the children in school under her charge. The exception to this testimony is not properly made. The record fails to show how much of her examination, made in the absence of the jury, was read to them after they returned, and it fails to show that any exception was taken to the action of the trial

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Judge upon the final disposition of this matter, and as to this feature the record is confused. In the view we have taken of the case, the evidence is immaterial.

It was not error to exclude the testimony of the same witness as to her opinion of what attracted the children to the water, nor Jno. Appling's opinion as to whether boys like to ride on a plank in the water. The Court rejected the testimony because it called for opinions merely, and there was no exception to the ruling, and what the answer would have been does not appear. Mr. Wall was asked if he found in his experience that this pond, with planks in it, was an attractive place for children. This was objected to by counsel for defendant, and there was no answer nor ruling by the Court. It was, moreover, but an expression of opinion. As the eleventh assignment, it called for a statement which the witness showed could only be given from hearsay, and it was properly excluded.

It is said the Court excluded all the evidence tending to show that the pond was attractive to children. This is too general. It does not point out specific questions asked and answers given, and does not attempt to do so. We have already referred to several questions, and the action of the Court thereon, bearing upon the question generally, but we cannot, on this general objection, look through the record to find what is referred to. But upon an examination of the whole record, we are satisfied

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that nothing material to the real issue in the case was excluded. The ground of liability, if any existed at all, was that the pond was an attractive place for children. Witnesses were not allowed to give their opinions as to this feature, but they were allowed to state the situation of the pond, its size, character and appearance, and what was on it to make it attractive, and different from any other sheet or collection of water, and any facts from which the jury might have inferred and concluded that it was or was not attractive. The Court did not specifically charge, upon this feature, whether the pond was attractive or not, and was not asked to do so, probably because the proof did not call for it, as the only evidence of attractiveness was that a plank was floating on the surface of the water; but how long it had been there, or by whom it was placed there, did not appear, and it was affirmatively shown that the defendant had no knowledge of the plank or the pond itself.

We find no reversible error in the record, and the judgment of the Court below is affirmed with costs.

Marley v. Foster.

MARLEY v. FOSTER.

(*Jackson*. April 12, 1899.)

1. TITLE TO LAND. *Not proved, when.*

The complainant fails to show title to land that supports a bill to remove a cloud and recover for timber taken therefrom, by proof of a tax sale that would have given his ancestor a superior title but for the fact that it was never perfected by deed, and by proof of a subsequent deed from the original owner to his ancestor, made upon conditions never complied with and withholden from registration for over twenty years, neither the complainant nor his ancestor ever having been in possession of the land or paid taxes thereon. (*Post*, pp. 242-244.)

2. TAX TITLE. *Invalid, when.*

A tax deed is insufficient to support ejectment where it does not recite that the land was "duly reported" as required by the statute under which the tax sale was made. (*Post*, pp. 246, 247.)

Act construed: Acts 1844, Ch. 92.

Case cited and approved: *Hightower v. Freedle*, 5 Sneed, 312.

FROM LAUDERDALE.

Appeal from Chancery Court of Lauderdale County.
Jno. S. COOPER, Ch.

C. P. MCKINNEY for Marley.

C. B. SIMONTON, THOS. STEELE, and W. G. LYNN
for Foster.

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McFARLAND, Sp. J. The original bill in this case was filed by Jo. C. Marley against W. H. Foster and wife, to enjoin a suit then pending in the Circuit Court of Lauderdale County, of Foster and wife for \$57.19 against complainant, this being Mrs. Foster's share of proceeds of some timber sold by Marley from a tract of land known as the Blackwell land, owned jointly by Marley and Mrs. Foster. The ground of this application for an injunction was that he, Marley, and Mrs. Foster owned jointly another tract of land of some 416 acres, also in Tipton County, Tennessee, known as the Ammon land; that Mrs. Foster owed him, Marley, an amount greater than this \$57.19 judgment—his share of timber sold by her from the Ammon tract. Her bill also sought to cancel, as a cloud upon his title to a half interest in this Ammon tract, a certain grant which was given by the State to Mrs. Foster, on March 6, 1895, to 1,175 acres, covering this Ammon tract in so far as this grant affected this tract, and also to have the land partitioned.

Foster and wife filed separate answers and cross bill. Mrs. Foster's answer denies that Marley had any interest in the Ammon tract, alleges she owns the entire interest in the tract, and her cross bill seeks an accounting with Marley for timber he had sold from this land. Foster, the husband, answers, saying that the Ammon tract is the separate estate of his wife, and he leaves the litigation as to this land between complainant and his (Foster's) wife.

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Foster's cross bill, however, set up that Marley has cut timber from two other and different tracts owned by him, Foster, and seeks an accounting for this timber.

By agreement of counsel, the Circuit Court suit was transferred to this Court for determination, and thus, by this bill and these cross bills, all these separate and diverse matters are combined into one suit. Many entries and grants and plats and deeds are filed, and much proof taken, all dumped, as it were, in this record, and the Court is asked to settle, as best it can, these separate and conflicting claims.

The Chancellor denied the relief prayed for in the original bill, except to cancel the grant for the 1,175 acres as to a tract known as the Ball tract, and decrees in favor of Mrs. Foster as to the Ammons tract, also as to the suit for \$57.19, and in favor of Foster, the husband, for an accounting by Marley for timber sold from the other two tracts owned by Foster. The complainant appeals and assigns errors.

Notwithstanding the number of grants and deeds and volume of proof, the titles to all the lands in controversy are very unsatisfactorily deraigned, and the facts are not very clearly proven. The main issue raised by the pleadings was as to the ownership of the Ammon tract of 416 acres, in which Marley claimed half interest. This tract is overflowed land in Mississippi bottom, and valuable prin-

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cipally for its timber. It was granted by the State of Tennessee to Peter Ammon in year 1837. In 1845 it was sold for taxes of 1844, and bought by L. S. Maclin, the father of Mrs. Foster. In 1846 it was again sold for taxes, and bought by D. M. Henning. A stipulation in the record concedes the regularity of the proceedings in both these tax sales. Maclin, the purchaser in the first sale, did not take tax deed from the Sheriff until 1854, when he took deed from the successor of the Sheriff who sold. This Sheriff's deed was registered in 1854, soon after it was executed.

It does not appear that any tax deed was ever taken by Henning. However, on the fourteenth day of April, 1854, Peter Ammon, the original owner, conveyed to Henning an undivided interest in this tract, the deed reciting that it was for the consideration of his tax right to this tract of land, and in consideration of his, Henning, paying all the costs that had accrued legally on this tract of land up to this date. This deed was not recorded until November 9, 1875, more than twenty-one years after its execution, and Henning seems not to have complied with conditions of deed to same, or to have paid any taxes, or to have exercised any act of ownership over same until, on November 20, 1875, he quitclaims this half interest to Marley, and from this time, up to filing his bill in 1897, Marley seems to have claimed to have owned this one-half interest,

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and sold some timber from it, but does not appear to have paid any taxes on it.

As to Maclin, it appears further that in April, 1887, he took quitclaim deed from a Mrs. Seay, a daughter of Peter Ammons, for an undivided half interest in this tract. This transaction, however, is sought to be explained by Foster, who knew the circumstances of this conveyance, and who says Mrs. Seay was one of two children left by Ammons, and that this explains why she conveyed only a half interest. He says, further, that she was a handsome widow; that Maclin was a gallant old gentleman somewhat smitten with the widow's charms, and he paid her the fifty dollars for this land as a means of making an inoffensive contribution to the widow, who, it appears, was then needing assistance.

These are the many facts as to the title and ownership of this Ammons tract, and the question is whether Marley owns a half interest, or whether Mrs. Foster, the only heir of Maclin, owns and is entitled to recover this whole tract; or whether either have shown sufficient for recovery in ejectment. As to Marley, it seems clear he had no such title to the half interest claimed by him as entitles him to recover in this cause. It is true the tax sale to Henning in 1846, if regular, gave a superior title—being for subsequent taxes—to tax sale of 1845 to Maclin. But it has been shown Henning never perfected his title by deed. It is true that in 1854 Ammons quitclaims to Henning a half interest, but

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this deed was upon conditions which it is not shown were ever complied with by Henning, though this is not very material. He did not even record his deed for over twenty-one years—in November, 1875, just before he sold to Marley. He paid no taxes for all these years nor exercised any acts of ownership. He knew all that time that Maclin claimed title to the land, that he was claiming all of it. He was paying taxes on it, and Marley also knew the plain facts as to title and claim of ownership. He did not testify in his own behalf in this cause.

As to the title of Maclin, it is contended by Marley that his, Maclin's, tax deed, procured from Sheriff in 1854 on the tax sale of 1845, was void, because it did not recite that said land was "duly reported." Citing *Hightower v. Friedle*, 5 Sneed, 312.

This case of *Hightower v. Freedle* holds that under the Act of 1844, Ch. 92, it must appear in the proceedings of condemnation and sale of land for unpaid taxes, "that the land so sold lies in the county in which it has been reported for nonpayment of the taxes thereon, and that it has been duly reported," etc., and that these recitals must appear in the Sheriff's deed, executed upon proceedings of condemnation and sale. This fact not appearing in this Sheriff's deed, upon which cross complainant, Mrs. Foster, relies to maintain this action of ejectment, she must fail upon this point. Neither is it shown in this record that Mrs. Foster or her father (Maclin) have had such adverse possession by actual occu-

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pancy of any portion of this land claimed under this Sheriff's deed, as color of title, as will entitle her to recover in this ejectment suit. The result of these conclusions is that complainant, J. C. Marley, is entitled to no relief as to this 416 acres, the Ammons tract, and that Mrs. Lula Foster is entitled to no relief as to this Ammons tract on her cross bill, neither party having shown clear legal title, and both the original bill of Marley and the cross bill of Mrs. Foster, as to this 416 acre Ammons tract, must be dismissed, but without prejudice to either party. With these modifications the decree of the Chancellor is affirmed and the cause is remanded to the Chancery Court for the taking of the accounts ordered in the decree below upon the matters of said decree herein affirmed.

The costs of the Court below, and of this Court to this date, will be paid one-half each by complainant and defendants.

Russell v. Farrell.

RUSSELL v. FARRELL.

(*Jackson*. April 12, 1899.)

1. EVIDENCE. *Practice of admitting incompetent reprobated.*

The practice of permitting incompetent testimony, in this instance an alleged newspaper interview, without authentication, under a promise of subsequently ruling it out if it is not made competent, is of doubtful propriety at best, and should be permitted only in exceptional cases for expediting trials, when the probability is great of supplying evidence of competency. (*Post*, pp. 252, 253.)

Case cited and approved: *Dawson v. Holt*, 11 Lea, 583.

2. LIBEL. *Defendant's post litem statement not admissible, when.*

A publication made by defendant concerning the plaintiff, pending an action for libel, is inadmissible when it is neither a confession or explanation of the libel sued on nor an admission of malicious intent in writing and publishing it. (*Post*, pp. 251-253.)

Case cited and approved: *Saunders v. Baxter*, 6 Heis., 369.

3. SAME. *Erroneous charge as to justification.*

In an action of libel, where there is no plea of justification, and no effort made to prove the truth of the libelous language, it is reversible error for the Court to charge that proof of the truth of the language used was a complete defense and that the burden was upon the defendant to make such proof. (*Post*, pp. 253, 254.)

Cases cited and approved: *Railroad v. Collins*, 85 Tenn., 227; *Railroad v. Lee*, 90 Tenn., 570; *Railroad v. Pugh*, 95 Tenn., 419.

FROM SHELBY.

Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

Russell v. Farrell.

FINLAY & FINLAY and J. R. BOYLE for Russell.

JAS. M. GREER for Farrell.

McFARLAND, Sp. J. This is an action of damages for libel, brought in the Circuit Court of Shelby County. The declaration alleges that J. H. Farrell, the plaintiff below, had been Deputy Sheriff of Shelby County prior to September 1, 1896, at which time W. W. Carnes had been elected a Sheriff; that defendant, V. C. Russell, "published in writing to said Sheriff and divers others the following statement, viz.: That plaintiff, while acting Deputy Sheriff of Shelby County, Tennessee, did collect costs in an action wherein this defendant was a party twice," and that the inevitable result of such publication was to injure plaintiff in his said office, and that this the defendant knew and intended such result. To this the defendant plead not guilty.

Subsequently, by leave of Court, the plaintiff filed an amended declaration, in which he repeats substantially the allegations of the first declaration, and added, as new matter, that since the bringing of this action, the defendant, Russell, had caused to be printed a libelous, scurrilous, false, and malicious statement in a certain newspaper, the *Evening Herald*, printed in Memphis, the substance of which was a statement of the controversy between himself and Farrell leading up to the libel suit. In this publication in the *Evening Herald*, purporting to be an interview with Russell, the statement nowhere

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appears that Russell charged Farrell with collecting costs twice, but that Farrell had said to him, Russell, that "I had paid to him his costs and those due the Justice also, showing him my books. Farrell did not deny the amount, which needed only five dollars to balance accounts;" that subsequently Esq. Haynes had demanded his costs, and Russell refusing to pay same, Haynes had sued the plaintiffs in the original suits—patrons of Russell, who was a real estate agent—and had collected these costs.

The article also describes a personal difficulty between Farrell and Russell in Haynes' office, in which Farrell had abused Russell, and threatened him with a pistol, and concludes: "When Sheriff Carnes was preparing to appoint deputies, I stated the above occurrence to him, and added that we desired better government; I did not approve of John Farrell being reappointed. Now, because Farrell could not get a reappointment, he wants to sue somebody." The article added, "Farrell has lately figured in several unfortunate cases," and this last statement is also charged to Russell in this amended declaration. To this amended declaration there was a plea of not guilty.

When the cause came on for trial, Farrell testified first, and offered to read this newspaper article, when its reading was objected to, and the Court finally permitted it to be read, saying, "I admit this solely upon the question of the state of Rus-

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sell's mind toward Farrell to show malice; no recovery can be based upon it. I have decided that it cannot be pleaded in this suit by adding a new count. It being published since the summons was issued, it should have been made the subject of a new suit." The newspaper article was then read to the jury, over the objections of the defendant.

The cause then proceeded to final judgment upon the charges made in the general declaration, the substance of which was that Russell had written Carnes that Farrell, as an officer, collects costs twice. There was a verdict and judgment for \$2,500, and, on motion for new trial, the Court directed a remittitur of \$1,500, which was done, and motion for new trial overruled.

The first assignment of error is that the Court erred in admitting the newspaper article published after the institution of this suit, to be read to the jury. The objections urged to the reading of this article are: (1) That it was not sufficiently proven; (2) because it was published after the suit was brought, and was not an admission of the former libel or explanatory of same. The record shows, upon this first proposition, that the article was offered without any proof whatever of its authenticity, or even of its publication. The newspaper with this article was offered by plaintiff in connection with his testimony, confessedly knowing nothing about its origin, and the Court permitted it to be read, saying that unless there is some proof connecting the

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defendant with it it must go out. After plaintiff's testimony was all in, and defendant, Russell, was on the stand, he was asked by plaintiff's counsel as to this interview, and he said he had not written it; had nothing to do with the paper. "A young man came to me the next day after Farrell sued me, and asked me to tell him what the facts were about the case. I told him just like anybody else would do. I may have told him what you have read to me out of the paper, but I am positive I did not say to him that Farrell had figured in several unfortunate cases lately. I may have told him the balance, I cannot say now."

Here is neither an admission nor denial, except as to a part of this interview, and leaves its authenticity and publication to rest alone upon itself. The Court erred, therefore, in permitting this evidence to be read at all, and especially permitting this paper to be read to the jury in the first instance, without connecting defendant in any way with it, or first proving its authenticity. *Dawson & Campbell v. Holt*, 11 Lea, 583. This practice of permitting incompetent testimony to go to the jury, under promise of subsequently ruling same out if it is not made competent, is of doubtful propriety at best, and has been frequently condemned by this Court. It is often hurtful to opposing litigants, even though ruled out, and should be permitted only in exceptional cases, for expediting trials, when the probability is great of supplying evidence of competency.

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This evidence was inadmissible upon the second ground of the exception, because it was a publication subsequent to that sued on, and was neither an explanation of the letter written to Carnes nor an admission of malice in writing the first. The rule is thus laid down in *Saunders v. Baxter*, 6 Heis., 369, in which this subject was extensively discussed and the authorities reviewed. Says the Court, p. 392: "In view, therefore, of this great conflict and confusion of authority upon this question, and of the reasons of the law, we feel a sense of safety in adhering to our own rulings upon this subject, that a plaintiff in an action of libel cannot introduce in evidence for any purpose a publication of the defendant made subsequent to that sued on, unless the subsequent one be an explanation or confession of the former, or contain an express admission of the malicious intent in the first publication."

There is no admission in this newspaper interview that Russell had any malice in writing a letter to Carnes, nor is there any explanation in this of the particular libel complained of, to wit: "That Farrell had collected costs twice." The explanations, if such they may be called, are as to the facts leading up to the writing the letter and not of the letter. It was, therefore, incompetent, and it is reversible error because of its probable damaging effect upon the defendant before the jury.

It is also assigned as error, that the Court charged that if the jury found the facts alleged to be libelous

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were true, then this was a complete defense, but that the burden of proving that the charge was true was upon the defendant. It is insisted that inasmuch as there was no plea of justification, nor effort to prove the truth of charges made, this charge was hurtful, and, being totally inapplicable, was error. We think this was error. *Railroad Co. v. Collins*, 1 Pickle, 227; *Railroad Co. v. Lee*, 6 Pickle, 570; *Railroad Co. v. Pugh*, 11 Pickle, 419.

For these reasons the judgment is reversed and the cause remanded with costs.

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KNIGHTS OF HONOR v. DICKSON.

(Jackson. April 14, 1899.)

102	255
117	585

1. EVIDENCE. *Not hearsay, when.*

It is a well established proposition that when the question is whether a party acted prudently, wisely, or in good faith, the information on which he acted, whether true or false, is original and material evidence. (*Post*, pp. 258, 259.)

2. SAME. *Introduction of.*

Time and manner of introduction of evidence are matters within the discretion of the trial Judge. (*Post*, pp. 258, 259.)

3. WITNESS. *Interest.*

The interest of a witness goes to the credibility of his testimony and not to its competency or admissibility. (*Post*, p. 259.)

4. LIFE INSURANCE. *Effect of misrepresentations.*

Under a life policy conditioned upon the truth of the assured's answers and representations contained in his application and in the report of the medical examiner, the policy will be vitiated alike by any misstatement of fact, whether made willfully and with knowledge of the falsity or in good faith through ignorance of the truth, but as to matters of opinion, it is sufficient if the statement was made in good faith and on the best information had or obtainable. (*Post*, pp. 259-263.)

Cases cited: *Insurance Co. v. Lauderdale*, 94 Tenn., 640; *K. of P. v. Rosenfeld*, 92 Tenn., 510; *K. of P. v. Cogbill*, 99 Tenn., 28; *Boyd v. Insurance Co.*, 90 Tenn., 212; 16 Wash., 155 (S. C., 58 Am. St. Rep., 28); 119 Ind. (S. C., 12 Am. St. Rep., 393, note).

FROM SHELBY.

Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

Knights of Honor v. Dickson.

CARROLL & MCKELLAR for Knights of Honor.

J. C. MYERS, J. M. GREER, and S. J. SHEPHERD for Dickson.

WILKES, J. This is an action by the widow and mother of the deceased upon a policy of life insurance in the order of Knights of Honor upon the life of Paul S. Riley. There was a trial before the Court and a jury, and a verdict and judgment for the amount of the policy and interest, in all, the sum of \$2,145.54, and the lodge has appealed and assigned errors. In the application for membership in the order, in this case the applicant stated, "I further agree and contract that the answers I shall make to the questions propounded to me by the medical examiner, as shown by the medical examiner's blank, hereto attached, are true, and I agree that they shall form the basis of my contract with the Supreme Lodge Knights of Honor." In the certificate of membership of policy of insurance the agreement upon the part of the order is "to pay upon condition that the statements made by said member in his petition for membership, and the statements made by him to the medical examiner, are true; and it is agreed that these statements be made a part of the contract, and they are warranted to be true."

In the medical examiner's blank, insured was asked, "Have you ever had any of the following diseases?" Among others, disease of the lungs.

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Answer, "No." Question, "How many brothers have you had?" Answer, "Two; one living, at the age of seventeen; one dead, at the age of twenty-two." Question, "Cause of death of the one dead?" Answer, "Malarial fever."

It is claimed that these answers were false as to the physical condition of the insured and as to the cause of the death of the brother; that they must be treated as warranties, and that as a result, the policy is not collectible. The medical examination for insurance was made June 6, 1897; the insured was examined by a physician, and was told he had galloping consumption, and could live but a short time, and he died Nov. 28, 1897, or about five months and twenty-two days after the examination for insurance was made. It also appears that one of the complainants, Mrs. Margaret A. Dickson, who was the mother of insured, was present when the medical examination was made, and helped to answer the questions propounded to him.

It is claimed, by way of defense, that the brother did not die of malarial fever, but of consumption. It appears that he was in bad health, and went to San Antonio, Texas. Before his return the insured also went to Texas, but not to the same locality. While the latter was still in Texas, the brother returned to Tennessee and died, and the insured was not present at the time of his death, but learned of it from his mother afterward.

The first assignment of error is to the admission,

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in rebuttal, of certain statements of the mother, Mrs. Margaret A. Dickson, as to what information, or means of information, Paul Riley, the insured, had of the cause of the death of his brother, Willie Riley. She had already been examined and cross-examined, and proved the death of her son, and that the doctor said that he died of acute consumption, and that his brother, Willie, had previously died, and that his physician said to her and to him that he had catarrh of the stomach and malarial fever, and that she had told her son, Paul, what the physician stated was the cause of Willie's death—that he died with catarrh of the stomach and malarial fever, and that Dr. Jones had so told her, and that he, Paul, had no opportunity to know the cause of Willie's death except what she told him.

This evidence, the record shows, was objected to when offered, and the objection overruled and exception taken; but the record does not show upon what ground the objection was based. In argument here it is said the statement could only be a self-serving declaration not brought out in examination or cross-examination, but on a recall of the witness by way of rebuttal.

We are not able to see why this evidence was not admissible. The truth of the answers made upon the medical examination was in issue, as was also the good faith and means of knowledge of the applicant, and, upon plaintiff's theory of the case,

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the questions of good faith and means of information were material.

It is a well - established proposition that when the question is whether a party acted prudently, wisely, or in good faith, the information on which he acted, whether true or false, is original and material evidence. Greenleaf on Evidence, Sec. 101. The interest of the mother in making the statement is a matter which went to the credit to be given her testimony, and not to the competency and admissibility of it. The time and manner of its introduction on the trial of the case was within the discretion of the trial Judge.

Without taking up the other assignments seriatim, it may be stated that they relate to the charge of the Court and the question of law as to whether the statements made in the application and medical examination are to be treated as warranties or representations, and whether their falsity or incorrectness will defeat recovery if made in good faith.

It is insisted the question asked as to the cause of the brother's death was material, that the answer was incorrect and misleading, and that it was, in fact and legal effect, a warranty. The insistence is that the Court, in effect, charged the jury that if the answer was made in good faith, and from the best of the applicant's information, it would not defeat recovery if it was untrue, and it is urged that the correct rule is that such statements will defeat the policy, whether willfully and intentionally false,

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and known to be so or not,* citing, to sustain this proposition, the case of *Insurance Co. v. Lauderdale*, 10 Pickle, 640.

It is also insisted that the Court did not correctly charge that the applicant must, in his examination, make known every fact material to the risk known to him, or that, in all reasonable probability, ought to have been known to him, as to his own health, and, on failure to do so, the policy would be avoided; and if any misstatement was made material to the risk it would invalidate the policy, whether the misstatement was willful and intentional or made through inadvertence or in good faith.

We are of opinion the criticisms made upon the charge are not well made. It is true that any statement made of a material fact which forms the basis of the contract must be considered as a warranty, and if false will vitiate the contract whether made in good faith though ignorantly, or willfully and with knowledge of the falsity. But there is a difference between statements of fact as such and statements of opinion on matters where only opinion can be expressed. Falsehood may be predicated of a misstatement of fact but not of a mistaken opinion as to whether a man has a disease when it is latent and it can only be a matter of opinion. As to what a person may have died of may be largely, if not altogether, a matter of opinion, about which attending physicians often disagree, and as to such matters their statement made can only be treated as repre-

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sentations and not as warranties, and if made in good faith and on the best information had or obtainable, they will not vitiate a policy if incorrect and not willfully untrue. Bacon Benefit Societies, Sec. 203; 11 Am. & Eng. Enc. L., p. 304, Sec. 5, note 3.

This is the doctrine laid down in *Knights of Pythias v. Rosenfield*, 8 Pickle, 510, and *Knights of Pythias v. Cogbill*, 15 Pickle, 28—see, also, May on Insurance, Sec. 166; *Dooley v. Hanover Fire Ins. Co.*, 16 Wash., 155 (S. C., 58 Am. St. Rep., 28); *Phoenix Ins. Co. v. Pickle*, 119 Ind. (S. C., 12 Am. St. Rep., 393, and note)—and is not in conflict with *Boyd v. Insurance Co.*, 90 Tenn, 212, and *Insurance Co. v. Lauderdale*, 10 Pickle, 642.

The former was a case of insurance against fire, and the representation or statement was that the property was a dwelling occupied by a tenant. This was a statement of fact material to the risk on which the insurer relied, and the truth of which the assured must have known, or by the slightest diligence could have known. It was not in any sense an expression of opinion, but a positive statement of fact resting upon knowledge and not upon opinion. The Lauderdale case was a case of accident insurance, and the statement in that case was of a material fact peculiarly within the knowledge of the applicant—"That his habits of life were correct and temperate." It was a fact about which he could not have made an innocent mistake, and it was in no way an expression of opinion. It was untrue in fact

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in that case, and the insured was burned up in a dwelling while intoxicated. It was stated in that case that whether the statement be treated as a representation or warranty, if untrue, it would avoid the policy.

The Court, in response to special requests by the defendant's counsel, said that if Mrs. Dickson, the mother of the insured, and one of the joint beneficiaries in the policy, was present when the application was made, and stated, or caused her son to state, that his brother died of malarial fever, when, as a matter of fact, he died of consumption, then, if such statement was adopted by the insured, and relied on by the company, it was material to the risk, and, the son soon thereafter dying of consumption, it would avoid the policy, whether the incorrect statements were made intentionally, or through mistake and in good faith, and there could be no recovery. And, again, that if she helped her son to make the answers, it was her duty, as well as his, in the utmost good faith, to disclose fully and truthfully, in answer to questions, all that either of them knew about the health of the applicant, his exposure to a contagious or infectious disease, and what his brother died of, and if they, or either of them, misstated or concealed the fact that the brother, some time before, died of consumption, and the insured, a short time after being insured, died of consumption, then the Court charges that such misstatement or concealment was a fact material to the

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risk and avoided the policy, whether intentionally made or made through mistake, and the verdict must be for defendant.

This was stating the case as contended for by defendant, and, as we think, too strongly, specially as to matters about which the statements must necessarily be mere opinions, but there is certainly nothing of which defendant can complain, as it was putting the case on his theory. It is said that inasmuch as the Court charged this rule as to the mother particularly and directly, there is no evidence on which a verdict in her favor could rest, unless the jury disregarded the charge.

We think this assignment is not well taken, as there is some evidence that the brother did die of malarial fever, and not of consumption, and this was the statement of the attending physician, according to the testimony of the mother. The weight of testimony is that the insured was not affected with any disease when he was examined, but it manifested itself soon afterwards, and rapidly proceeded to his death. We think the plaintiffs are entitled to recover the policies, and interest thereon. The judgment is affirmed with costs.

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ROYAL INS. CO. v. VANDERBILT INS. CO.

(*Jackson*. April 15, 1899.)

1. FIRE INSURANCE. *Contract limitation does not apply, when.*

□ A printed stipulation in a policy of reinsurance, drawn up on the printed form ordinarily used for property insurance, limiting the time for commencement of a suit on the policy to twelve months next after the loss, is not a part of the policy where there is attached a written slip stating that the insurance provided is a *pro rata* part of each and every item insured by the policy of the reinsured company. (*Post*, pp. 265-272.)

Cases cited: 145 Mass., 419; 153 Mass., 63; 99 N. Y., 124.

2. SAME. *Contract limitation begins to run, when.*

The loss contemplated by a printed provision of a policy of reinsurance drawn up on the ordinary blank used for property insurance, limiting the time for the commencement of an action upon the policy to twelve months after loss, does not accrue, if the provision applies at all to such policy, until the reinsured company has paid the loss under the original policy issued by it. (*Post*, pp. 270, 271.)

3. SAME. *Policy, how construed.*

The conflicting or doubtful provisions of an insurance policy are construed most strongly against the company issuing the policy. (*Post*, pp. 269, 270.)

Cases cited: 95 U. S., 678; 111 U. S., 341; 127 U. S., 666.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
JNO. L. T. SNEED, Ch.

Royal Ins. Co. v. Vanderbilt Ins. Co.

CARROLL & McKELLAR for Royal Ins. Co.

SMITH & TREZEVANT for Vanderbilt Ins. Co.

BEARD, J. This is a suit on a policy of insurance. The complainant company carrying a risk on cotton in a compress at Greenville, Texas, secured from the defendant a policy of insurance by which it undertook to underwrite the complainant to the extent of one-half its risk. The cotton covered by the original policy was destroyed by fire on November 14, 1887, and proofs of loss were immediately furnished to the Royal Insurance Company, which company also notified the Vanderbilt Insurance Company. Controversy as to liability having arisen, litigation between the assured and the Royal Insurance Company ensued, and a final settlement with the owners of the cotton—the assured in the original policy—was not made until the year 1895. After the settlement the reinsured was called upon by the complainant to make good its contract of indemnity by paying the *pro rata* of the loss sustained, and, declining to do so, the present bill was filed. Recovery was in the Court below, and is now, resisted upon three grounds, first, the statute of limitations of six years; second, the contract limitation of twelve months, and, third, that proof of loss had not been furnished in time. The Chancellor, upon the hearing of the cause, dismissed the bill, and complainant has appealed.

The original policy of insurance, issued by the

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reinsurer, was lost or mislaid, but a copy of it was properly proven, and constitutes a part of the record. The form used for the purpose of this insurance was one that was primarily intended for the insurance of property, and an inspection of the instrument shows that none of the printed stipulations or conditions, save one, could apply to a contract of reinsurance. In order to give it application to such a contract, and to give the complainant the indemnity it sought, as is shown by the testimony of the secretary of the defendant, a slip was pasted upon the face of the policy, on which it was provided that the intention was to cover the complainant company's liability in its policy already issued on the cotton in question, followed by this clause: "It being hereby understood and agreed that such insurance is a *pro rata* part of each and every item insured by the policy of the reinsured company, and subject to the same risks, valuations, conditions, and mode of settlement as may be taken or assumed by said company, it being expressly agreed, however, that notice of any change in the risk, or additional privileges granted, shall be at once given to this company. Loss, if any, payable at the same time, in the same manner, and *pro rata* with the amount paid by said company."

The stipulation in the policy, on which the defendant relies for defense as a contract limitation, is as follows: "13. It is furthermore hereby expressly provided that no suit for the recovery of any claim,

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by virtue of this policy, shall be sustainable unless such suit shall be commenced within twelve months next after the loss shall occur."

A contract of reinsurance is peculiar in its character, and differs from the ordinary policy of insurance. It creates no privity between the reinsurer and the party originally insured (*Gantt v. Amer. Ins. Co.*, 68 Mo., 533); it is simply an agreement to indemnify the assured, partially or altogether, against a risk assumed by the latter in a policy issued to a third party (*Commercial Mut. Ins. Co. v. Detroit F. & M. Ins. Co.*, 38 Ohio St., 16).

In such a case "the assured is not the owner of the property at risk," and has "no relation to it except as insurer under the original policy." But in that relation the party issuing the original policy has an insurable interest which will support a contract intended to indemnify him against the hazard he has assumed. "But manifestly," as is said in the *Manufacturers' Ins. Co. v. Western Ins. Co.*, 145 Mass., 419, "many provisions appropriate to an ordinary agreement with the owner of property, for the insurance of it could have no proper application to a contract," such as the one in question. In the course of the opinion in that case, it is further said: "Whenever words are found in a contract which can have no proper application to the subject to which it relates, they cannot be regarded; and not infrequently the careless use of printed blanks compels recognition of this rule."

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The policy sued on in that case was one of re-insurance, to a company which had issued its policy on mortgaged property. It contained a stipulation making void the policy, if, without the written consent of the company, the property insured should be sold or transferred, or there should be any change of title. The mortgage or trust deed was foreclosed, and the property was bought by a third party, to whom, by the consent of the insurer, the original policy was transferred. Soon thereafter the property was injured by fire, and the original insurer having paid the loss, sued the reinsurer for his *pro rata* of this loss, when the latter set up as a defense the stipulation in his contract above referred to. In the face of that policy was written the same contract of indemnity as is found in the policy here sued on, and it was held that "this agreement rendered nugatory many printed portions of the policy in which it was inserted. This was special and peculiar, pertaining directly to the subject-matter of the contract, and it controlled those parts of the policy which were inconsistent with it," and among others, the stipulation relied on to defeat recovery. This principal was again announced and applied to a different state of facts by the same Court, in *Fanuel Hall Ins. Co. v. Liverpool Ins. Co.*, 153 Mass., 63.

In the case of *Jackson v. St. Paul Ins. Co.*, 99 N. Y., 124, the distinct question here involved was raised. One of the contentions of the reinsuring

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company was that the action was barred by the limitation clause in the contract of reinsurance. The opinion of the Court of Appeals of New York was given by Danforth, J. Disposing of the contention, he said: "The other objection rests upon a clause in the policy which provides that no action 'for recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained, fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within twelve months next ensuing after the loss shall occur.' This clause formed a part of a blank form intended as an ordinary contract of insurance, where the assured had an interest in the property, was required to make proof of the loss by fire, and submit his claims to arbitrators if required, and fulfill many other conditions in no respect applicable to a case where the perils of a contract of primitive insurance only are involved, and where the loss or damage is the amount of liability under it. Such is the contract under which the plaintiff claims, and his right to recover is unaffected by the stipulation." (Page 130.) May on Insurance, Sec. 12 (b).

But should we concede that the principle announced by those authorities is unsound, there is another ground upon which this particular defense must fail. It is well settled that when a policy of insurance contains contradictory provisions or has been

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so framed as to make necessary a judicial construction, its own words will be taken most strongly against it. *First National Bank v. Hartford Ins. Co.*, 95 U. S., 678; *Moulen v. Am. L. Ins. Co.*, 111 U. S., 341; *Traveler Ins. Co. v. McConkey*, 127 U. S., 666.

Applying this rule to this policy of reinsurance, the Vanderbilt Company must fail on this point of its defense. Its contention is that the loss it insured against was a loss by fire. This is a mistake. It indemnified, to a limited extent, against the liability which the first insurer assumed by his contract, and, accepting this thirteenth clause or stipulation as a part of the contract, the loss which it refers to must be taken to be that which accrued to the party indemnified when it made payment to discharge its liability. This is the only construction which can be given to this stipulation to save the conditions of the policy from irreconcilable contradiction. For not only the slip already quoted, but the seventh clause or stipulation (this being the only one in the policy which in its original form refers to reinsurance) provides as follows: "Reinsurance to be on the basis that in no event will this company be liable for a sum greater than such portion hereby reinsured bears to the whole sum insured by the company reinsured, and in case of loss this company to pay *pro rata* at the same time and in the same manner as paid by the company reinsured."

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If it be, as is now contended by the defendant company, that the loss which its policy covers was the loss by fire in 1887, and that was the beginning of the contract period of limitation, then this renders nugatory the obligation of the reinsurer to pay "at the same time and in the same manner" as does the reinsured. Such a construction would be to reverse the rule and interpret the contract most strongly against the assured.

Again, this was not the construction that either of these companies, during their dealings, put upon this contract. While the complainant notified defendant, immediately after the fire, of the loss, yet no formal proofs of loss or demand for reimbursement were then made. They were not made until after the complainant settled with the railroads in 1895. But complainant did give notice to the Vanderbilt Company of the resistance made by it to the payment of the loss, and that company clearly acquiesced in this resistance of its assured, because, as is said by its then secretary, Mr. Jones, it thought the position taken by the Royal Insurance Company was "a proper one to take."

In addition this witness said: "We granted reinsuring policies often to the Royal Insurance Company on its various risks, and my recollection is that, by the terms of these policies, we were subject to the same liabilities as that company was under its original policy, and we would settle our portion of the loss as they [it] settled under their

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[its] policies, at the same time and in the same manner, and we were subject to the same adjustment, settlements, and agreements which it made. In short, we accepted, as a rule, one-half of their risks and assumed one-half of the obligations imposed, and our risks were to be settled as theirs, and when they finally settled their risks they made the adjustment and called upon us to pay our *pro rata*.”

Again, in 1890, Mr. Parker, who was at the time secretary of the defendant company, addressed a letter to the agents of the complainant company, in which he assured them that though his company was then in process of liquidation, yet the claim of complainant was being provided for. Thus it will be seen that the construction put by us on this policy is that which these companies all the time placed upon it, and the one which regulated their dealings with one another. We think this construction was sound, and it is evident in adopting it, as we do, we reach the merits of this case. It follows, as this bill was filed within three months of the payment of the loss by the complainant company, the defense of limitation is in no particular well taken. As to proofs of loss, it is sufficient to say that those furnished were sufficiently full, were such as it was the custom of the two companies to supply and receive, and were accepted by defendant company, so far as this record shows, without objection. There is, therefore, nothing in this contention.

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The decree of the Chancellor is reversed, and a decree will be entered here for \$968.18, this being the aggregate of the amount due, and interest from dates of payment by company, and costs.

Memphis v. Waite.

MEMPHIS v. WAITE.

(*Jackson.* April 15, 1899.)

1. DEED. *Construed by Court.*

The question whether the calls of a deed extend to, or stop short of, a river is one of law for the Court, and should not be left to the jury. (*Post*, p. 277.)

2. LIMITATIONS, STATUTE OF. *Not applicable, when.*

The statutory requirement that suit must be brought by the owner within twelve months, where private property is taken possession of for some work of internal improvement, has no application to an action against a city for its use and occupation of certain property as a dumping ground, without any intention of acquiring the property for permanent public use. (*Post*, pp. 278, 279.)

Code construed: § 1867 (S.); § 1572 (M. & V.); § 1348 (T. & S.).

3. ACTION. *Joint, by co-tenants maintainable, when.*

The several owners of lots composing a block may join in an action to recover compensation for the use and occupation from a third person who has occupied the whole block. (*Post*, p. 279.)

4. LICENSE. *Not implied, when.*

A city cannot escape liability for the use and occupation of premises for a dumping ground, at least for the period subsequent to the commencement of a suit against it for the previous use and occupation of the land, upon the ground that the use of the land by the city, without objection from the plaintiff, created an implied gratuitous license from him. (*Post*, pp. 279, 280.)

Case cited: *Loague v. Memphis*, 7 Lea, 67.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby County. L. H. ESTES, J.

Memphis v. Waite.

PERCY & WATKINS for Memphis.

HENRY CRAFT for Waite.

McFARLAND, Sp. J. This suit was commenced in April, 1898, by Charlotte Waite and Forshay and wife and Floretta Siglar, to recover of the city of Memphis compensation for the use and occupancy of certain property in the city of Memphis known as lots 1, 2, 3, 4, block 1. The legal title to lots 1 and 2 was in the heirs of Frank Waite, deceased, subject to the homestead of Mrs. Waite, his widow; lot 3 in Charlotte Waite, co-plaintiff herein; lot 4 in Charlotte Waite. These lots compose one block, having a front of 240 feet on Tennessee Street on the east, and running back to the Mississippi river on the west some 200 feet, and having for its northern boundary Linden Street projected, and on the south Talbot Street projected, neither of these being open abutting this block. About half way between Tennessee Street on the east and the river on the west there is a precipitous bluff some 75 feet in height, and that part of this block between the bluff and the river is but a few feet above the river. The city of Memphis owns the block north of this Waite block, extending from Linden to Beal Street on the north, Beal Street being open to the river. On the southern line of the Waite block the bluff approaches near the river, and there is no access to this low part of the Waite lot except from the north, over the city lot.

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In 1882, Mrs. Waite, acting for herself and the other plaintiffs, who were living on the bluff portion of the block, leased the block to one Alley at \$75, per month, for several years, and then to O'Neal & Co. for several years at the same rental. Subsequently—and there is considerable discrepancy in the dates given by the witnesses—the ground between the bluff and the river was washed entirely away by the river.

About 1891 the city of Memphis began to use the lower part of the lot for a dumping place, and gradually extended the made land south on the water front. The public also used the same place as a dumping ground. Then the government built a dike at the foot of Talbot Street, extending it out into the river; and thus, through all these agencies, this made land was extended down the whole river front of the Waite property. About 1891 the city established its dump foot near the southwest corner of the lot, and since then, up to the bringing of this suit, has occupied the whole river front of this property, its roadway being about double the width of an ordinary road, and over this road, from the city's lot on the north to the southern line, the dump carts passed constantly. In March, 1895, Mrs. Waite and the other complainants brought their first suit against the city for use and occupation of this block up to that date, and on April 16, 1898, brought this suit for use and occupation for the time between March, 1895, and April, 1898. Both

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suits were tried together, and there was a verdict and judgment in the first suit for \$21, and in this the second suit for \$2,000, and appeal to this Court in the last case.

The first assignment of error is as to this part of the charge of the Court below, as follows: "The Court charges you that the conveyances presented in evidence make plaintiffs the beneficial owners of the property, and as such they were entitled to its reasonable rental value."

Two grounds are alleged why this charge was erroneous. First, that the Court by this charge determined that the plaintiffs did own to the river bank, the defendants claiming that the plaintiffs owned back a certain number of feet, which did not carry this title to the bank of the river, and urged that the Court should have left to the jury to determine whether or not plaintiffs owned to the bank of the river. We do not think this contention sound. It is the duty of the Court, and not the jury, to interpret the muniments of title, and whether, under the deeds to these lots, the title ran to the river or not was a question of law, to be determined by the Court upon its construction of the deeds, and not a matter of fact left with the jury.

The other contention of defendant was that, under the latter clause of this charge, when the Court, after interpreting the deed to the effect that the plaintiffs owned to the river, adds, "and as such owners they were entitled to its reasonable value,"

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the Court decides for the jury the question whether plaintiffs were entitled to the rent. This contention would have some force if this was all of the charge of the Court as to whether plaintiff was entitled to recover rent or not. The Court had already specially charged the jury what facts were necessary to be proven by the plaintiffs in order to charge the city with payment of rent. The first charge given on this point is, "They [the plaintiffs] should satisfy you that they are the owners, and as such are entitled to the rent of the property." There was no request by the defendant for the Court to explain more fully what would entitle plaintiffs to collect rents. The charges asked by the defendant on this point were as to what would prevent them from collecting rents, and these were in themselves erroneous.

The next assignment necessary to be noticed is that "the Court erred in not charging that if the public had been using this roadway for a number of years—say, ten years—the plaintiff could not recover in a suit for rent and occupancy against the city, and section 1867 (Shannon's Code), providing that where property is taken possession of for some work of internal improvement, suit must be brought in twelve months, is relied on. This objection is answered by the facts and condition of the record. There was no pretense that the city had taken possession of any portion of this lot as a public highway, or intended it as such, and this

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statute, as to taking private property for public uses, has no application.

The next assignment is that the Court refused to direct the jury that, if they found for the plaintiff, they must find what amount was due each plaintiff. No principle of law or authority is cited in support of this contention. The pleadings treated this block of land as a whole. There was no proof of any difference of time or manner of occupancy or rental value of the separate parts. The judgment concludes each and all the plaintiffs from further recovery against the city by any of them for this same cause of action. It is immaterial to the city how the plaintiffs apportion the recovery. There is no reason why several owners of lots composing a block may not join in a lease for a joint rental. If the defendant has, by its occupation and use of the whole block, made an implied contract of joint renting, we know of no legal reasons for drawing distinctions between this implied contract and a written lease with same joint obligation, especially where, as here, no sufficient pleas raising the question were filed. This assignment is not well taken.

The next assignment is that the Court refused to charge the jury that if the city built a roadway, and used it for a great number of years without objection from the plaintiffs, and without any demand for rent, then there would be an implied gratuitous license, and the plaintiffs could not recover for use and occupancy. In support of this assign-

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ment the case of *Loague v. City of Memphis*, 7 Lea, 67, is cited. Under this 7th Lea case the charge asked for by the city on this point would have been error. It would have been the Court determining that merely because the city built the road the defendant had demanded no rent. These facts would in themselves have constituted an implied contract, because, without right to claim rent, says the Court, in the 7th Lea case, page 69, it was for the jury to say whether there was assent or license without intent to charge. The facts of this case take it clearly out of the principles contended for by defendant. In this last suit, the period for which plaintiffs seek to charge the city was from March, 1895, to April, 1898.

In March, 1895, plaintiffs brought this first suit against the city for the previous use and occupation of this land. This was notice that they expected to be paid for its use, and, in the face of this suit, the city continued to occupy, and it is for this occupancy since the plaintiffs sued defendant the first time, this second action was begun. It does not appear reasonable that the city could, after this first suit, demand for rent, and suit therefor, contend that it had a gratuitous license for occupancy without rent.

The next assignments, the eighth and ninth, are, first, that the verdict was excessive, and, second, that there was no evidence to sustain the verdict. It would be sufficient answer to both of these as-

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signments to say we differ from learned counsel for defendant, and that there was some evidence upon which the jury might have found to the full extent of this verdict.

Mrs. Waite testifies "that the property is well worth seventy-five dollars per month rental," and that she had rented it for previous years to two other tenants for the same, and two reputable witnesses of the city testify to the latter fact. This verdict of the jury was only at the rate of fifty-four dollars per month.

There were several other reasons ingeniously suggested by plaintiffs' attorney why this was cheap rental for this property, among others that, by reason of the location, surroundings, and physical condition of this property, this was the only dumping point the city had; that the water had, as it were, "cornered" the dumping privilege. Without passing upon these suggestions, it is sufficient to say that there was evidence submitted to the jury upon which, and the fair inferences therefrom, they could have found the verdict they did, and, under the rules of this Court, this verdict cannot be disturbed upon the grounds of these last two assignments of error. We add that if the city has been made to pay high for what it got, it took, without license, the property of the citizen, and held with knowledge that it would have to account, and municipal corporations may not do this any more than private citizens.

The judgment will be affirmed with costs.

Scatchard v. Barge.

SCATCHARD v. BARGE.

(*Jackson.* April 15, 1899.)

RECOUPMENT. *Must be specially pleaded.*

Matter in recoupment, as well as set-off, must be specially pleaded, and cannot be proved under the general issue.

Code construed: § 4639 (S.); § 3628 (M. & V.); § 2918 (T. & S.).

Cases cited: *Hogg v. Cardwell*, 4 Sneed, 151; *Waterbury v. Russell*, 8 Bax., 159; *Parker v. Steed*, 1 Lea, 206; *Gibson v. Carlin*, 13 Lea, 440; *Porter v. Woods*, 3 Hum., 56; *Sample v. Looney*, 1 Overton, 87.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby County. L. H. ESTES, J.

W. H. PHELAN and GEO. GILLHAM for Scatchard.

H. C. WARINNER for Barge & Derrick Co.

McALISTER, J. The defendant in error recovered a verdict and judgment in the Circuit Court of Shelby County against Scatchard & Son for the sum of \$1,659.48 for the towage of certain logs from Westover and Lake Jefferson, Arkansas, to Memphis, Tenn. Scatchard & Son appealed and have assigned errors.

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The declaration contained two counts, viz., one for breach of contract, and the other the common count. Scatchard & Son pleaded the general issue. The defendant introduced evidence tending to show that the logs in question originally belonged to one John Blackwell, who sold them to the Williams Sawmill & Lumber Co., at Memphis. Scatchard & Son contracted with the Williams company to pay for the logs so purchased or make advances on them to Blackwell, which was accordingly done by Scatchard & Son to an amount in excess of plaintiff's towing charges. Defendant's contention is that they agreed with plaintiffs that if they would properly tow to Memphis all the logs (Blackwell logs) then at Westover or near Lake Jefferson, the defendant would pay the towing charges; but that plaintiff towed only a part of said logs, and by their fault and negligence lost the remainder, on which defendant had made said advances; that some were lost at Westover by the high water carrying them away, and that others at or near Lake Jefferson were lost by the sinking of one of the plaintiff's barges. Defendants claim that, owing to the loss of said logs, they had no funds in their hands sufficient to pay the said towing charges; that defendant had advanced on the logs lost \$1,400, which was in excess of proper charges for logs actually towed. Defendants introduced evidence tending to show that whatever advances Scatchard & Son may have made on these logs had been fully repaid out of the proceeds of

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the logs actually received by them, and that at the time this suit was brought they had reimbursed themselves for all such advances, and had a surplus in their hands. It appears, however, that on the trial below defendants sought, under the general issue, to recoup the plaintiff's claim for towage by the value of the logs lost, at least to the extent that defendants had made advances on them, but the Court excluded such proof upon the ground that recoupment must be specially pleaded, and could not be made available under the general issue.

The principal assignment of error is upon the action of the trial Court in refusing to allow Scatchard & Son to prove damages by way of recoupment under the issues presented by the pleadings. In Martin's Edition Caruthers' History of a Lawsuit it is said, viz.: "Set-off and recoupment are defenses that must be specially pleaded. They are in effect cross actions, and are allowed primarily to prevent circuitry of action. The distinction between the two is this: Set-off consists of a demand not connected with, or arising out of, plaintiff's demand, existing at the commencement of the action in favor of the defendant against the plaintiff, while recoupment relates only to cross demands inseparably connected with, and necessarily arising out of, the contract upon which plaintiff sues." Sec. 128. This statement of the law is attacked as erroneous.

In *Sample v. Looney*, 1 Overton, 87, it was held

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that evidence in recoupment was admissible "either by plea or proof under the general issue."

In *Porter v. Woods, Stacker & Co.*, 3 Hum., 56, the judgment was reversed because recoupment of damages had not been allowed, and the only plea was the general issue.

In *Hogg v. Cardwell*, 4 Sneed, 151, Judge Caruthers said, viz.: "It does not seem to be very well settled whether the defense can be relied on under the general issue without special plea, or at least notice, but it is doubtless better practice to plead it to avoid surprise to the other party."

While the authorities were in this apparent conflict the Act of 1855 was passed (Shannon's Code, §4639), viz.: "The defendant may plead, by way of set-off or cross action, (1) mutual demands held by the defendant against the plaintiff at the time of action brought and matured when offered in set-off (Acts 1756, Ch. 4, Sec. 7); (2) any matter arising out of plaintiff's demand, and for which the plaintiff would be entitled to recover in a cross action (Acts 1855-56, Ch. 71, Sec. 1). Code of 1858, §2918.

The Act of 1855-56 clearly refers to matter of recoupment, which, at common law, was the right of defendant, in the same action, to claim damages from the plaintiff, either because he has not complied with some cross obligation of the contract upon which he sues, or because he has violated some duty which the law imposed upon him in the mak-

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ing or performance of that contract. Bouvier's Law Dictionary. We are aware of no case decided since the Act of 1855-56 which holds that recoupment may be relied on under the general issue. In the case of *Hogg v. Cardwell*, 4 Sneed, 151, decided in 1856, it was held, viz.: "Any false representation by the bargainor, made at or before the time of the execution of a written contract of sale, as to the value of the property sold, intended as an inducement to the bargainor, and having that effect, by which the bargainee is injured, whether innocently or fraudulently made, constitutes good ground for recoupment of damages, upon special plea by defendant, in a suit upon such contract." In *Waterbury v. Russell*, 8 Bax., 159, plaintiff sued defendant for balance due on price of corn sold in sacks and delivered to him. Defendant filed a special plea for recoupment, upon the ground that the corn was found to be badly damaged by heating, mould, and rust; that, in sending said corn to market, it was sold at a loss, which defendant sought to have recouped or set off against the plaintiff's claim. In that case the plea was special. The case of *Parker v. Steed*, 1 Lea, 206, was an action at law to recover the price of a brick dwelling house. The declaration contained two counts—one on the special contract and the other on a *quantum valebant*. The pleas were (1) the general issue; (2) a claim of damages by way of recoupment, by reason of the gross negligence and want of skill of plaintiff in

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erecting said house, whereby it was wholly useless to defendant, etc.. In that case there was a special plea of recoupment.

The case of *Gibson et al. v. Carlin*, 13 Lea, 440, was a bill in equity, and the answer specifically set up the damages claimed. Counsel for plaintiff in error cite in support of their contention *Moore v. McGaha*, 3 Cooper's Chy. Rep., 415. The bill in that case was filed to enjoin a judgment at law, and the demurrer was sustained upon the principle that a party will not be aided by a Court of Equity after a trial at law unless he can impeach the justice of the verdict on grounds of which he could not have availed himself at law or of which he was prevented availing himself by fraud or accident or the act of the opposite party, unmixed with negligence or fault on his part. In that case it appeared that the complainant had been sued and a judgment recovered against him at law for balance due on a building contract, in which suit complainant failed to plead set-off, cross action, or recoupment for damages sustained in consequence of the builder's failure to do his job in a workmanlike manner and with good material, as he contracted to do. The Chancellor held that the defenses now relied on (set-off and recoupment) were necessarily involved in the action at law, and that the complainant, having had full opportunity to make them in that suit, was clearly precluded from coming into equity upon them.

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The Chancellor remarked “arguendo,” that the damages claimed could have been shown in the action at law, under the general issue, without special pleading, citing *Porter v. Woods*, 3 Hum., 56. The Chancellor did not notice the Act of 1855–56, which we hold changed the rule on this subject and made it imperative on the pleader to rely by special plea on his claim of recoupment. This has always been the rule where the party desired to rely, by way of set-off, upon some demand disconnected with the subject-matter of the plaintiff’s claim, and we see no reason for two different rules in respect of matters so nearly cognate as set-off and recoupment.

It results that there was no error in the action of the Circuit Judge in excluding this evidence, and the judgment is affirmed.

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RAILROAD v. DELANEY.

(Jackson. April 15, 1899.)

1. LIBEL. *Words not actionable per se.*

A statement in a recommendation of a former employe that, "like many others, he left our service during the strike," is not libelous or actionable *per se*, so as to constitute a cause of action without special damages. (*Post*, p. 295.)

Cases cited and approved: *Bowdre v. Bank*, 92 Tenn., 723; *Fry v. McCord Bros.*, 95 Tenn., 679; 91 U. S., 227.

2. SAME. *Publication.*

The delivery of a letter of recommendation for a former employe to a person who, by his authority, requested it, is not a publishing of any libel contained in it. (*Post*, p. 294.)

Cases cited: *Sylvis v. Miller*, 96 Tenn., 94; 24 Atl. Rep., 244.

3. SAME. *Insufficient averment of special damages.*

An averment of special damages in a libel case is insufficient in these words, to wit: "That plaintiff has been greatly injured in his business; he has been unable to obtain employment; he has been deprived of the right to follow the vocation of his choice, to his great damage, \$10,000." (*Post*, pp. 295-297.)

Cases cited: *Fry v. McCord Bros.*, 95 Tenn., 678; 91 U. S., 225.

FROM SHELBY.

Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

ADAMS & TRIMBLE for Railroad.

BELL & HORNE for Delaney.

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McALISTER, J. Delaney commenced this suit in the Circuit Court of Shelby County against defendant company to recover damages for an alleged libel contained in the following letter:

“KANSAS CITY, MEMPHIS & BIRMINGHAM R. R. Co.

“J. H. SULLIVAN, SUPT.

“MEMPHIS, TENN., May 16, 1896.

“*To Whom it May Concern*—The bearer, J. P. Delaney, worked for the company as foreman of blacksmith shop, and was considered very competent. Like many others he left our service during the strike. But I think he is thoroughly convinced that he got on the wrong track, and that no trouble from this source need be apprehended from him again. For his family's sake I hope he may obtain employment, and I believe he will prove a faithful man hereafter.

“J. H. SULLIVAN, *Supt.*”

After setting out the letter, the declaration proceeded: “The aforesaid writing was known by the defendant to be false when it made and published the same. The plaintiff did not leave the service of the defendant during the strike, and this fact was well known to the defendant. The plaintiff took no part in said strike, and this fact was well known to the defendant. The aforesaid written and published false statement was made willfully and maliciously for the purpose of injuring plaintiff in his trade and calling.”

There was a demurrer to the declaration upon

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the ground that it did not make any sufficient averment of special damages suffered by the plaintiff in consequence of the libelous words spoken of and concerning him. The point of the demurrer was that, the words not being libelous *per se*, the action could not be maintained without an averment of special damages. The demurrer was overruled. The defendant pleaded not guilty and justification. The latter plea, in full, is as follows: "It says that at the special instance and request of the plaintiff, one R. A. Speed, acting as the plaintiff's friend and agent, went to J. H. Sullivan, who was employed by defendant company as superintendent of operating department of its railroad, and asked him to give him, Speed, a letter addressed 'To whom it may concern,' recommending plaintiff, as well as the facts would justify, for employment, at the same time stating that he knew that said Sullivan could not give him a letter addressed to any railroad, because Delaney had been connected in some way with the strike. He further stated to said Sullivan that if he would give him a letter of recommendation, addressed as above, he thought Delaney could get employment with the Louisville & Nashville Railroad, at Memphis. Accordingly, said Sullivan, with intent to aid and assist plaintiff, and without malice, wrote the letter, dated May 16, 1896, declared upon, and delivered the same to said Speed, to be delivered by said Speed to said Delaney. The contents of said letter were made known by said Sullivan to

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said Speed at the time said letter was delivered, and at his urgent request, but were made known by defendant's or said Sullivan's acts to no other person. Defendant avers that the contents of said letter are true in substance and in fact."

On the trial below it was not controverted that the letter was written, but it was insisted that it was written at the request of plaintiff, and delivered to his agent, Mr. Speed. The latter went to Sullivan, superintendent of the Kansas City, Memphis & Birmingham Railroad, to get a letter recommending Delaney to Captain Slusser, of the Louisville & Nashville Railroad, for employment. Sullivan refused to give a letter to Slusser. Thereupon Speed represented to Sullivan that Delaney was a poor man, had a large family, and would like a letter from him "To whom it might concern;" that it might do him some good. After some hesitation Sullivan finally agreed to give such a letter, saying he felt sorry for Delaney, and would like to see him get something to do. Speed testified that he showed the letter to no one, and had not communicated its contents to anyone excepting Delaney.

The record fails to show that this letter ever came to the knowledge of any persons other than Speed and Delaney. It does show that Delaney himself showed it to Captain Slusser, master mechanic of the Louisville & Nashville Railroad at Memphis, for the purpose of securing employment. There was evidence tending to show that on July 3, 1894, a

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time long anterior, Delaney was working in the shops of defendant company, at Memphis, in the capacity of railroad blacksmith. On that day what was known as the Debs strike was begun, and the shops of defendant company were immediately closed. Delaney, it appears, was a member of the American Railway Union, and, after the shops were closed, attended a meeting of that organization at the courthouse in Memphis, and, in a public speech, stated that, as the Kansas City Railroad Company had acceded to the demands of the strikers not to haul Pullman cars, he would have nothing to do with the strike. Delaney testified that he told Briggs, the master mechanic of defendant company, under whom he had worked, that he was ready and willing to work at any time; that Briggs asked him if he was a member of the American Railway Union, and, on his admitting that he was, Briggs discharged him. This was denied by Briggs. Evidence was introduced by the company tending to show that on the fifth or sixth of July, while the shops were still closed, it became necessary to have the rigging of a passenger coach repaired, and Briggs sent for Delaney to do the work. Delaney came, and, on being told what was wanted, said he would have to consult the Blacksmiths' Union, whereupon Briggs discharged him. Sullivan, the superintendent, was afterwards told that Delaney had been discharged for refusing to do the work required. It is claimed by Sullivan that he was acting on this information when he

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stated in the letter that Delaney, "like many others, left our service during the strike."

It will be observed that this suit is not to recover damages for the breach of a contract or for discharging Delaney from the service of the company, but is for the publication of a libel based upon the following language in the letter, namely: "like many others, he left our service during the strike." It will be remembered that this letter was written at the urgent solicitation of Mr. Speed, acting as the friend of Mr. Delaney. Neither Delaney nor Speed expressed any dissatisfaction with it at the time it was written, but received it and attempted to make use of it. The only publication of the letter was in making its contents known to Speed. No witness was produced who had refused to employ Delaney on account of the letter, nor were any special damages alleged or proved.

There is no evidence of publication in this record. The proof is undisputed that this letter was written by Sullivan at the request of Mr. Speed, who was acting by authority of plaintiff. Speed accepted it and delivered it to plaintiff, who used it in seeking employment. Under the authorities the company is not liable for any of the consequences of the act of Delaney in making publication of the letter after it reached his hands. If a person receives a letter containing libelous matter, he will not be justified in publishing it. *Sylvris v. Miller*, 96 Tenn., 94; *Wilcox v. Moon*, 24 Atlantic Reporter, 244.

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In view of the facts of this case, was the delivery of the letter by Sullivan to Speed a publication? Unquestionably not. It was precisely the kind of letter that Speed expected to get, and he accepted it without objection or complaint.

The Court instructed the jury that the letter was not libelous or actionable *per se*, which we hold to be correct. But when words are not libelous in themselves, it is necessary to allege in the declaration and prove special damages as a condition of recovery. *Bowdre v. Bank*, 92 Tenn.; *Fry v. McCord Bros.*, 95 Tenn., 679. The objectionable words are, "Like many others, he left our service during the strike." The Court correctly instructed the jury that these words are not libelous or actionable *per se*, because they are not of such a nature that "necessarily must or presumably will, as their natural or proximate consequence, occasion pecuniary loss without any allegation or evidence of damage other than that which is implied or presumed from the fact of publication." *Pallard v. Lyon*, 91 U. S., 227; *Bank v. Bowdre*, 92 Tenn., 736.

The letter does not contain a charge which must necessarily occasion injury, and the law requires proof, and will not presume damages. It was therefore necessary to allege and prove special damages. The allegation of damage is "that plaintiff has been greatly injured in his business; he has been unable to obtain employment; he has been deprived of the right to follow the vocation of his

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choice, to his great damage \$10,000.” This allegation is not sufficient. In *Lyon v. Pollard*, 91 U. S., 225, the words were not actionable *per se*. The allegation of damage was that the plaintiff had been damaged and injured in her fame and name. The Court said that, in such cases, the declaration must set forth precisely in what way the special damage resulted from the speaking of the words. The judgment in that case, in favor of the plaintiff, was arrested. In *Fry v. McCord*, 95 Tenn., 678, the words were not actionable *per se*. The declaration in that case alleged that plaintiff was greatly injured in his good name and credit, brought into public scandal, infamy, and disgrace, and that he was prevented from getting any of the necessities of life, goods, wares, and merchandise; that he has suffered great anxiety and pain of mind, and become incapacitated for business, and hence is damaged \$5,000. The Court said, viz.: “But there is no statement of any instance in which his credit was impaired or credit refused him, or in which he failed to procure any of the necessities of life or any other particulars, nor are the names of any persons given, nor any reasons given for the failure to give names or identify persons.” Citing Newell on Defamation, p. 867, Sec. 41. The Court held that, for want of proper allegation of special damage, the declaration was bad in substance, and reversed the ruling or demurrer and dismissed the case.

The present case is not at all analogous to the

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case of *St. Louis & Iron Mountain R. R. Co. v. Johnson*, decided by this Court at its April term, 1897. In that case the libel charged was "that plaintiff had been discharged for insubordination, as well as being at the head of a disreputable mob not hesitating to do anything to the injury of the company's property," etc. The Court held this language libelous *per se*, and that it was unnecessary to allege or prove special damages, since the charge was necessarily hurtful, and that, if false, plaintiff might recover general damages. In that case this Court affirmed a judgment in favor of the plaintiff for \$1,500.

This case does not present such language as constitutes a libel *per se*, and, there being no special damages alleged, the action cannot be sustained. The judgment of the Circuit Court is reversed, the demurrer sustained, and the suit dismissed.

Judge McFarland being disqualified, did not participate in the decision of this case.

Railroad v. Craig.

*** RAILROAD v. CRAIG.**

(*Jackson*. April 15, 1899.)

1. COMMON CARRIER. Limiting common law liability.

The common law liability of a carrier is not affected by the issuing and delivery to the shipper of a bill of lading limiting the carrier's liability after the shipment has commenced. (*Post*, pp. 300, 301.)

2. SAME. Same.

A common carrier may, by stipulation in its bill of lading, limit its common law liability for loss or damage of freight not caused by its own negligence, but it cannot do so unless it gives the shipper, at the time, the opportunity to elect, upon just and reasonable terms, between the limited and the full liability of the carrier. (*Post*, pp. 301, 302.)

Cases cited: *Railroad v. Gilbert*, 88 Tenn., 430; *Railroad v. Manchester Mills*, 88 Tenn., 653; *Railroad v. Sowell*, 90 Tenn., 17; 57 Ark., 112 (S. C., 18 L. R. A., 527); 39 Ga., 117 (S. C., 99 Am. Dec., 474).

FROM DYER.

Appeal in error from the Circuit Court of Dyer County. THOS. J. FLIPPIN, J.

DRAPER & RICE for Railroad.

W. W. CRAIG for Craig.

* The authorities on the right of a common carrier to limit common law liability by contract in the absence of negligence are collected in a note to *Little Rock & Ft. S. R. Co. v. Cravens* (Ark.), 18 L. R. A., 527.—REPORTER.

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CALDWELL, J. J. R. Craig obtained a verdict and judgment against the Illinois Central Railroad Co. for the sum of \$250, as damages for injury to his soda fountain while being transported over the defendant's line of road from Dyersburg to Obion Station. The injury to the soda fountain consisted in the breaking of its valuable and indispensable marble parts into numerous small and worthless pieces. At the trial below the company sought to introduce before the jury a bill of lading under which it claimed the shipment was made, and which recited upon its face, in explicit terms that the company would not, in any event, be liable for loss or damage resulting from the breakage of marble. The refusal of the trial Judge to permit the introduction of that instrument is the principle ground on which the company asks a review and reversal of the lower Court's action. The proposed evidence was rightly rejected and withheld from the jury. The goods were, in fact, shipped without a bill of lading of any kind, and the paper in question did not contain the real contract of shipment or shed any true light upon it. This paper was issued after the transit had been completed and the damage done, and that, too, without any knowledge on the part of the shipper of a purpose or desire on the part of the company, at any time, to limit its common law liability in any manner whatever.

When the goods were delivered to the company at Dyersburg, and by it there accepted for trans-

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portation, its agent at that place was engaged in the sale of tickets for a passenger train soon to go by, and, for that reason, he could not then issue a bill of lading. He told Craig, who, with others, took passage on that train, that the goods would be properly shipped, and a bill of lading forwarded to him. Nothing was said by either party about the form or terms of the instrument to be issued, nor did Craig know of the company's custom to limit its liability in the transportation of that class of freight. He, in fact, thought that a bill of lading was a mere receipt for the goods to be shipped, and that such would be the instrument agreed to be forwarded.

After the soda fountain reached its destination and was discovered by Craig to be in a dilapidated and ruined condition, he procured a friend at Dyersburg to call on the company's agent there for the promised bill of lading or receipt, and, on the request of that friend, the paper here in question was made out and delivered to him, and by him sent to Craig. Soon thereafter, and without in any manner ratifying the terms of the bill of lading so furnished him, Craig notified the company of his damage and demanded full and unconditional indemnity therefor, and upon the company's failure to make payment he brought this action.

From this brief statement of the attendant facts it is entirely manifest that the present shipment was made without a bill of lading of any kind and without a contract limiting the company's responsi-

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oility, and consequently that the trial Judge ruled correctly when he excluded from the consideration of the jury the instrument subsequently issued as a bill of lading and sought to be introduced by the company as a contract for limited responsibility. Moreover, though it were conceded that this paper was in fact issued before the transportation of the goods as a bill of lading therefor, it would, nevertheless, be invalid in so far as it provides for limited liability. This would be so, because the shipper was not offered, and could not have obtained, a reasonable and *bona fide* alternative between conditional and unconditional liability on the part of the company for injury that might happen to his goods, but must have accepted the bill of lading in its present form and terms or not been allowed to make the shipment at all. The agent who issued this paper, while testifying before the jury on behalf of the company, said that it was "the usual and only bill of lading issued to shippers of the kind of freight that the plaintiff shipped on that occasion," and that "he would not have shipped the fountain for the plaintiff if he had refused to accept a bill of lading in that form and in the terms of that one."

It is well settled that a common carrier may, by a stipulation in its bill of lading, limit its common law liability for loss or damage of freight not caused by its own negligence. But this cannot be validly done unless the carrier, at the time, holds

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itself in readiness to transport the freight with or without such limitation and allows the shipper a reasonable and *bona fide* alternative between the two modes of shipment. *Railroad v. Gilbert, Parkes & Co.*, 88 Tenn., 430; *Railway Co. v. Manchester Mills, Ib.*, 653; *Railway Co. v. Sowell*, 90 Tenn., 17; *L. R. & Ft. S. Ry. Co. v. Cravens*, 57 Ark., 112 (S. C., 20 S. W. Rep., 803, and 18 L. R. A., 527); *Wallace v. Mathews*, 39 Ga., 117 (S. C., 99 Am. Dec., 474; 4 Elliot Railroads, Sec. 1504; Ray's Neg. Imp. Dut., 45, 48, 181; Redman's Law Ry. Carriers (2d Ed.), 66.

The company sued in the present case does not bring itself within the imperative requirement of this rule. On the contrary, it affirmatively shows by the testimony of its agent, just quoted, that it used but one bill of lading for this class of freight, submitted no alternative to the plaintiff, and would not have shipped his goods at all if he had refused to accept its bill of lading providing for limited liability. Such a provision, so obtained, was necessarily invalid, and, being so, it was not competent evidence for any purpose.

The several other matters urged against the judgment of the Court below have been thoroughly considered and will be treated orally from the bench without specific mention in this opinion. None of them are of such nature as to stand in the way of an affirmance, which is ordered.

Dornan Bros. v. Benham Furniture Co.

DORNAN BROS. v. BENHAM FURNITURE CO.

(*Jackson*. April 15, 1899.)

1. REPLEVIN. *Judgment in, not impeached, when.*

A judgment for defendant in replevin, allowing him interest upon the value of the property seized during detention, cannot be impeached by a motion to quash an execution issued thereon; but, if it could, the impeachment would be vain, as such judgment conforms strictly to the law. (*Post*, pp. 304, 305.)

Code construed: § 5144 (S.); § 4126 (M. & V.); § 3390 (T. & S.).

2. SAME. *Execution quashed.*

Where a judgment for the defendant in replevin is in the alternative for the return of the goods seized, or their value in a sum specified, an execution issued thereon against the plaintiff's property for the value of the goods, without providing for satisfaction by return of the property, is fatally variant from the judgment, and will be quashed on motion. (*Post*, pp. 305, 306.)

Case cited and distinguished: *Epperson v. Van Pelt*, 9 Bax., 75.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby County. L. H. ESTES, J.

T. W. BROWN for Dornan Bros.

I. H. PEREZ for Furniture Co.

CALDWELL, J. Dornan Bros. brought this action of replevin against the Benham Furniture Company

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to recover the possession of a large lot of carpeting. The jury returned a verdict in favor of the defendant, fixed the value of the goods delivered to the plaintiffs under the writ at \$595, and assessed no damages. Upon this verdict judgment was entered in favor of the defendant and against the plaintiffs and the sureties on the replevin bond for \$595, the value of the goods, and \$148.75 interest thereon from the service of the writ, making in all \$743.75. The judgment recited upon its face that the recovery of \$743.75 might be fully satisfied by a return of the property involved.

Subsequently an execution was issued to the Sheriff, commanding him unconditionally to collect the \$743.75, and making no allowance whatever for the return of the property. Thereupon the plaintiffs moved the Court to quash the execution for several reasons assigned. Only two of these reasons need here be stated. They are (1) that the execution includes interest on the value of the goods when none was allowed in the verdict on which the judgment was entered, and (2) that the execution did not permit satisfaction by a return of the property. The motion to quash was overruled, and the plaintiffs have appealed in error.

1. In the inclusion of interest, the execution rightly followed the judgment. It could not have been regular and valid otherwise. The insistence of counsel that the judgment itself was bad because it included interest when none was allowed by the jury,

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can be of no avail in this proceeding. A judgment cannot properly be impeached for such a reason on a mere motion to quash an execution (*Hall v. Claggett*, 63 Md., 57), and if it could, the impeachment would be a vain one in this case, because this judgment is in strict accordance with the law. By the terms of the statute (Shannon, § 5144) the defendant, being successful in the suit, was entitled to recover the value of the goods, with interest thereon, and damages for their detention, the value of the goods and the damages to be found by the jury, and the interest to be added as a matter of law.

2. The execution was fatally defective and should have been quashed because its mandate was for the unconditional collection of money and did not permit a satisfaction by a return of the goods. The judgment pursued the statute (Shannon, § 5144) in providing that the money recovery might be satisfied by a return of the property. The execution should have followed the judgment and included that provision.

The general rule that an execution must follow the judgment in all material particulars is applicable in this case as to both the interest on the value of the goods and the permission for their return. Both parties recognize the soundness of this rule, but they do not agree as to the extent of its application in this case. The plaintiffs would avoid it as to the item of interest and apply it as to the right to re-

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turn the property, while the defendant would apply it in the former instance and avoid it in the latter. It is equally applicable in each particular, and can be avoided in neither.

Counsel for defendant says that the goods were disposed of by the plaintiffs before the trial, and that for that reason it would be an idle and useless form to include permission for their return in the execution. But it is too late now to make that contention. It may be that unmistakable proof that the goods could not be returned would have justified the trial Judge in omitting from the judgment the provision in reference to their return (*Epperson v. Van Pelt*, 9 Bax., 75), but he did not do so, and both parties are alike bound by the terms of the judgment as entered. Let the execution be quashed for the reason that it does not follow the judgment as to the permission to return the property.

Thane v. Douglass.

THANE v. DOUGLASS.

(*Jackson*. April 19, 1899.)

1. DEMURRER TO EVIDENCE. *Rule stated.*

The demurrer to evidence admits not only the truth of all the evidence adduced, but also admits all the inferences that may be logically and reasonably drawn from the evidence. (*Post*, pp. 308, 309.)

Case cited and approved: *Hopkins v. Railroad*, 96 Tenn., 409.

2. NEGLIGENCE. *In handling runaway horse.*

Negligence in connection with the running away of a horse may be inferred, in the absence of explanatory circumstances, from the fact that it was the third time that the horse had run away. (*Post*, pp. 311, 312.)

Cases cited: *Young v. Bransford*, 12 Lea, 232; 13 Minn., 522; 21 Am. Law. Reg., 522.

FROM SHELBY.

Appeal in error from the Second Circuit Court of Shelby County. J. S. GALLOWAY, J.

DuBOSE & LAUGHLIN for Thane.

W. B. EDGINGTON for Douglass.

McFARLAND, Sp. J. This is a suit for damages for injuries to the person of Mrs. Margaret Thane, wife of William Thane. Trial before Justice of the

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Peace, appeal, and new trial in the Circuit Court, and a verdict for \$300, which was set aside, and a new trial awarded. On the second trial the plaintiff introduced his evidence, showing that Mrs. Thane was walking west upon Madison Street, in Memphis, Tenn., with her daughter, when they were suddenly and unexpectedly run into by a runaway horse, with a part of a wagon attached to him, which knocked them down, inflicting serious injuries. After plaintiff's proof had been introduced, defendant declined to introduce any evidence, and filed a formal demurrer to evidence, a practice already commended in proper cases by this Court. *Hopkins v. Railroad*, 12 Pickle, 409. The plaintiff joined on this demurrer, and, thereupon, the Court dismissed the plaintiff's case. The error assigned is this action of the Circuit Judge on this demurrer. It is contended by counsel for plaintiff that, under the proof in this case, and under the rules as to admission by demurrer to evidence of all facts proven and all proper inference therefrom, there should have been a judgment for plaintiff.

In *Hopkins v. Railroad*, 12 Pickle, 409, at page 422, this Court says: "The Court will also, on the argument of the demurrer, make every inference of fact in favor of the party offering the evidence, which the evidence warrants, and which the jury, with the least degree of propriety, might have inferred, but they ought not to make forced inferences." 1 Troubat & Haley's Practice, 509; 2 Tidd's

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Practice, 865; 3 Starkie on Evidence, 435; Elliott's General Practice, Secs. 855-858.

“The demurrer not only admits the truth of all the evidence adduced by the party against whose evidence the demurrer is directed, but it also admits all the inferences that may be legally and reasonably drawn from the evidence. The probative force of the evidence is not confined to the direct effect of the evidence, but extends to the results reasonably deducible from it by logical and legitimate inference. It follows, therefore, that the facts which the evidence directly or indirectly tends to prove must be taken as admitted.” 2 Elliott's General Practice, 858.

These being the rules applicable to demurrers to evidence, what are the facts proven? The plaintiff, Mrs. Thane, proved that the horse and wagon ran over her; that they came from behind, and she did not see the horse before the accident, nor at all, as she was rendered insensible. Her daughter, Miss Thane, who was with her, did see the horse, and that it was a gray horse attached to two wheels of a wagon. Other witnesses proved that defendant, Douglass, was a billposter, posting bills for the Grand Opera House; that he owned this horse; that it was seen twice before to break loose and run away. Douglass admitted he owned the horse. There were no facts or circumstances proven as to this runaway except that he was seen to run over these women. It is not proven where he started from,

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except from east on Madison Street, though the inference is he started from a billboard of defendant near the scene of accident, from which he was seen to run away before. There was no proof who had charge of the horse at the time of the accident.

The legal question thus presented is, Do these facts, together with all the logical inferences deducible therefrom, make out such a case as will throw upon defendant the burden of proving there was no negligence upon his part? The general rule is that every person having charge of an animal is bound to use due care under the circumstances which surround him, and if, in securing or driving or otherwise using or tending such animal he does not use such care, and another is injured, he is liable to damages. Where there is no want of care, and a person's horses break away and do damage, he is not liable. Lawson on Rights and Remedies, 1389; *Dolfinger v. Fishback*, 12 Bush, 477; *Meredith v. Reed*, 26 Ind., 334; *Hughes v. McNamon*, 106 Mass., 284; *Brown v. Collins*, 53 N. H., 442.

In *Rose v. Transportation Co.*, 21 Am. Law Reg., 522, which was an action in the Circuit Court of the United States by a passenger on a steamboat for injuries caused by an explosion of the boiler, Wallace, D. J., instructed the jury "that from the mere fact of an explosion it is competent for you to infer, as a proposition of fact, that there was some negligence in the management of the boiler or

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some defect in its condition, for otherwise a casualty would not have occurred."

In *May v. Davidson*, 13 Minn., 522, which was an action by a passenger on one steamboat for injury caused by the explosion of the boiler of another steamboat, the learned Judge who delivered the opinion, by way of obiter, it is true, says: "But, irrespective of the Act of Congress on this subject, and speaking for myself alone, I am inclined to the opinion that, under the undisputed facts of this case, the explosion is *prima facie* evidence of negligence."

In *Young v. Bransford*, 12 Lea, 232, this Court held that, in an action for damages caused by the explosion of a steam boiler used for running a saw-mill, it was error for the Court to charge that, when the injury is proved to have been done by the explosion, the burden is then thrown upon the defendant that he was guilty of no negligence." But, says the Court, further: "At the same time, the fact that there was an explosion, which is not an ordinary incident of the use of a steam boiler, ought to have some weight, inasmuch as it may be out of the power of the aggrieved party, in some instances, to prove any more. The reasonable rule would seem to be that laid down by Judge Wallace, as above, that, from the mere fact of an explosion it is competent for the jury to infer, as a proposition of fact, that there was some negligence in the management of the boiler or some defect in its condition."

We add that, doubtless, had this boiler been in the

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habit of exploding, the Court would have held that proof of third explosion would have been such *prima facie* evidence of negligence as would have thrown burden upon defendant of showing want of negligence. 2 Thompson on Negligence, p. 389, says: "The mere fact that a horse runs away upon a highway is not conclusive evidence of negligence on the part of its owner or custodian, but it is a circumstance from which negligence will be presumed, in the absence of explanatory testimony." *Hummel v. Wester, Bright*, 133; *Kennedy v. Way, Bright*, 186. Here, the proof was that this was the third time this horse had run away, and we are of opinion that from this circumstance alone, in the absence of explanatory circumstances, the Court should have inferred negligence, and overruled the demurrer, and submitted to the jury the question of damages.

This case and No. 17, heard at the same time with this, are reversed, and remanded to the Circuit Court for submission to a jury to assess the damages.

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(Jackson. April 19, 1899.)

1. CHARGE OF COURT. *Refusal to give special requests.*

Refusal to give requested instructions to the jury will not be reviewed by this Court where the request was made before, and not renewed after, the general charge was delivered. (*Post*, pp. 314, 315.)

2. DAMAGES. *Punitive allowed, when.*

Punitive damages for trespass by a telephone and telegraph company in cutting a tree may be recovered where the owner on the same day of and before the trespass warned the company's employees not to cut any trees on his premises, and they cut the tree in his absence and over the protest of his wife. (*Post*, pp. 316-319.)

Cases cited and approved: *Tel. Co. v. Hunt*, 16 Lea, 456; *Tel. Co. v. Poston*, 94 Tenn., 696.

3. SAME. *Same. General rule.*

Punitive damages are allowed where fraud, malice, gross negligence, or oppression intervenes. It is not essential that these facts shall appear by direct proof, but they may be inferred by the jury from the facts of the transaction. (*Post*, p. 319.)

Cases cited and approved: *Cox v. Crumly*, 5 Lea, 529; *Railroad v. Garrett*, 8 Lea, 439; *Railroad v. Gaines*, 11 Lea, 103; *Johnson v. Perry*, 2 Hum., 569; *Bryan v. McGuire*, 3 Head, 530.

4. EVIDENCE. *Of pecuniary ability admissible, when.*

When there is any ground or reason for punitive damages, the

*The measure of damages for injury to or destruction of trees is the subject of annotation to *Bailey v. Chicago, M. & St. P. R. R. Co.* (S. D.), 19 L. R. A., 653.—
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pecuniary ability of the wrongdoer may be given in evidence.
(*Post*, pp. 317, 318.)

Cases cited and approved: *Dush v. Fitzhugh*, 2 Lea, 307; *Railroad v. Gaines*, 11 Lea, 103.

FROM SHELBY.

Appeal in error from Circuit Court of Shelby County. J. S. GALLOWAY, J.

WM. M. FARRINGTON for Telephone & Telegraph Co.

TURLEY & WRIGHT for Shaw.

McFARLAND, Sp. J. This is a suit for the wrongful cutting, by the Cumberland Telephone & Telegraph Company, of a tree belonging to plaintiff in error, B. A. Shaw. The action was begun before a Justice of the Peace to answer B. A. Shaw in a plea of damages under \$500. There was judgment before the Justice for \$5; appeal to Circuit Court, trial before jury, and verdict for \$7.50; appeal to this Court, and assignment of errors. These assignments of error are five in number. Four of these are as to errors in the refusal of the trial Judge to give specific instructions as requested. As to these the record shows that the request for these specific instructions was made before the Judge had given his charge to the jury, and the request was not resumed after the Judge had charged the jury.

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Under the established rule of this Court it will not reverse in such cases, even though the special charges asked were in themselves proper to have been given, for, if the attorney does not, after hearing the charge so given, renew his request for special instructions, he is presumed to have considered the general charge as sufficient, and deemed it unimportant to his client's interest that the special charges previously asked be given. For this reason these four assignments of error must be overruled.

The first assignment of error is this: "The Judge erred in sustaining objections to questions propounded to Mr. Foster Hume, superintendent of the Memphis department of defendant in error's company, tending to show its ability to pay punitive damages." Upon this point the record shows that while Mr. Hume was being examined by plaintiff's attorney he asked his questions as to capital, business, etc., of the defendant company, "tending to show their ability to pay punitive damages," all of which were ruled out by the Court, whereupon plaintiff's counsel excepted upon the grounds that he was entitled to prove such facts to enable the jury to estimate punitive or exemplary damages, if they thought such were proper. The special charges requested by plaintiff and refused by the Court were mainly upon the question of punitive damages, but as we have decided these cannot be now considered, the only remaining question, therefore, is, Were sufficient facts

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proved by the plaintiff to allow these questions of punitive or exemplary damages to go to the jury?

The facts of the case upon this point were these: The plaintiff, Dr. B. A. Shaw, an old gentleman, eighty years of age, lives, with his wife, on Hernando Road, some ten miles from Memphis. As he was driving out of his yard on February 9, 1898, on his way to Memphis, he noticed a gang of four or five linemen at work stringing wires on the telephone poles of defendant company; that the same gang of men had worked the day before on part of his premises, and had cut several limbs and branches off of his trees, and on passing them he stopped and said to them that he did not want them to cut any more of his trees. They said they would not, and he continued on his way to Memphis. On his return in the evening he learned, and upon examination saw, that a large, healthy gum tree had been cut down, which tree was upon his property, and near by was a newly-erected telephone pole of defendant, which could not have been erected as it then was had the tree been left standing. Another witness testified that Mr. Hume, superintendent, admitted that his men had cut the tree.

There was other evidence tending to show that during the plaintiff's absence these employes of defendant company had begun to cut the tree, and were forbidden to do so by Mrs. Shaw, through a servant, but they paid no heed to the command.

We cannot distinguish this case, in its material

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facts of trespass without permission and under positive prohibition, with some actual damage, from the case of *Memphis Telephone Co. v. Hunt*, 16 Lea, 456, and *Cumberland Tel. & Tel. Co. v. Poston*, 10 Pickle, 696. In the first of these cases, under supposed license from the city, the telephone company went upon the land of Mrs. Hunt at night, after being prohibited from doing so by her, and cut some limbs from a shade tree, and there was a verdict for \$250. Though the record in that case does not show whether any part of this \$250 was given as punitive damages, the verdict was permitted to stand for this amount, while it does not appear the actual damage amounted to this sum. In the Poston case some limbs were cut from ornamental shade trees in Poston's yard without permission, though the superintendent thought he had permission. There was evidence admitted in this case in regard to the pecuniary ability of the defendant company. The jury was charged that if the cutting was done fraudulently, oppressively, or with gross negligence, they might, in their discretion, give punitive damages. This Court says: "We think there was sufficient proof of gross negligence and wantonness to justify the admission of evidence with a view to punitive damages, if the jury should decide it to be a proper case for damages. . . . When there is any ground or reason for punitive damages, the pecuniary ability of the wrongdoer may be given in evidence." *Dush v. Fitzhugh*, 2 Lea, 307; *Railroad v. Gaines*, 11

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Lea, 103; Sedgwick on Damages, Sec. 385; Sutherland on Damages, Sec. 744.

Other authorities hold that where fraud, malice, gross negligence, or oppression, intervenes, the law blends the interest of society and of the aggrieved individual and gives damages such as will operate as an example or warning to the parties or others to deter them from similar transactions. *Cox v. Crumly*, 5 Lea, 529; *Railroad v. Garrett*, 8 Lea, 439; *Railroad v. Gaines*, 11 Lea, 103.

There need not be positive proof of malice or oppression if the transactions or the facts shown in connection therewith fairly imply its existence, and it is left to the jury to look at all the circumstances in order to see whether there was anything in the conduct of the defendant to aggravate the damages. *Johnson v. Perry*, 2 Hum., 569; *Bryan v. McGuire*, 3 Head, 530.

Applying these principles to the facts of the case now under consideration, we find that all the essential facts of both the Hunt and Poston case, upon which liability was predicated, are found in this case. Here there was prohibition against the trespass and the commission of the trespass in the absence of the owner. Here the employes knew that the owner was absent, and this absence was taken advantage of just as in the Hunt case, the only difference being that in the last case the trespass was committed in the night. Here there was positive prohibition against doing the act, while in

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the Poston case there was only gross negligence in not getting permission from the true owner. While this is not a case for more than small punitive damages, if any are given in their discretion, by the jury, we are of opinion that it was a case where the Court should have permitted evidence to go to the jury as to the pecuniary ability of the defendant.

It is suggested, however, that this is a small case, with only \$7.50 verdict and judgment; that it is the policy of the law that there should be an end to litigation, with even the doctrine of "*de minimis non curat lex*" invoked. It is sufficient reply to these suggestions to say that it is the boast of the common law that the lowest shall have its benefits as well as the highest feel its power, and that consistency must characterize the administration of the law lest error creep into the State. The case is reversed and remanded for new trial under proper instructions.

Street Railway Co. v. Dan.

STREET RAILWAY CO. v. DAN.

(*Jackson*. April 19, 1899.)

1. STREET RAILROAD. *Duty of motorman.*

In an action against a street railway company for negligently crushing and killing a child with one of its cars, an instruction which states, in substance, that it is the duty of a motorman to keep a vigilant lookout for children on the street, and upon the first appearance of danger, or probable collision with any one of them, to stop his car in the shortest time and space possible, is not subject to the criticism that it makes no allowance for a sudden emergency, where it is apparent from the context that the Judge simply meant that the motorman must do all in his power under the emergencies then surrounding him to save the child. (*Post*, pp. 321-325.)

2. CHARGE OF COURT. *As to sympathy of jury.*

A statement of the trial Judge, in his charge to the jury in an action for the negligent killing of a child, that it was natural for them to have their sympathies aroused in behalf of the suffering, while not altogether proper, is not cause for reversal, although he did not state in that immediate connection that they must not allow their sympathies to enter into the consideration of the case, when he was not asked to so charge, but did in fact so charge in another connection. (*Post*, pp. 326, 327.)

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby County. L. H. ESTES, J.

Street Railway Co. v. Dan.

TURLEY & WRIGHT for Street Railway Co.

GANTT & PATTERSON for Dan.

WILKES, J. This is an action for the killing of Mary Dan, a child four years of age, by the street railroad company. It is brought by her father as administrator. It was tried before the Court and a jury, and a verdict and judgment rendered for two thousand five hundred dollars, and the street car company has appealed.

The child was run over at the intersection of Second and Jackson Streets on a day when Mardi Gras was being celebrated, and the streets were crowded with men, women, and children. The child ran upon the tracks and was run over by the car. There is a difference of statement as to how fast the car was going, and how far it ran after passing over the child. It is not necessary to state the evidence fully, as it is apparent it is abundantly sufficient to support the verdict and judgment, and it must be affirmed, unless there is error in the action of the Court either in the admission of the evidence or in the charge of the Court.

It is assigned as error that the trial Judge erred in permitting an ordinance of the city to be introduced in evidence, which was intended to regulate the running of street cars and to inflict a fine for its violation. So far as the objection goes to the admission of this ordinance as evidence, it cannot avail in this Court, as no objection appears in the

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record to have been made to its introduction in the Court below. It is said, however, that it was error in the trial Judge to give it in charge to the jury. This assignment cannot be sustained, as made, inasmuch as it was not charged, and the trial Judge did not in his charge refer to it, or instruct the jury that they could base any finding on its provisions. He did charge the measure of duty of the street car company in terms somewhat the same as that prescribed by the ordinance, but he did not refer to the ordinance as creating, fixing, or enlarging the duty of the company, so that the question resolves itself, at last, into whether the duty and liability of the street car company was properly charged, without reference to the ordinance.

The ordinance is in this language: "Conductors and drivers of each car shall keep a vigilant lookout for all trains, carriages, and persons on foot, and especially children, either on the track or running towards it, and, on the first appearance of danger to such trains or persons or other obstructions, the car shall be stopped in the shortest time and space possible." And then follows a clause providing a penalty of from \$1 to \$50 for a violation of the ordinance.

The charge of the Court is as follows: "It was the duty of the motorman operating defendant's car No. 110 to keep a vigilant lookout for children in, upon, or using the streets, and, upon the first appearance of danger or probable collision with any

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one of them, to stop his car in the shortest time and space possible.”

It will be seen that the charge is more directly applicable to the facts of the case than the ordinance, and also added the feature of a probable collision, which is a very important one to the other features in the case, and presented a case of more immediate peril than that set out in the ordinance.

In the same connection, and immediately afterwards, the trial Judge said substantially: “If the motorman saw, or, by vigilant lookout could have seen, the child going into a place of danger in time to have stopped his car and prevented the collision, and he failed to do so, then this would be negligence on the part of the motorman and would make the company liable for the collision and injury; and again, if the time elapsing between the time when the motorman could have first seen the child going into a place of danger and the time when the collision occurred was not enough for him, acting as a careful, prudent motorman, to have done what was necessary to be done in order to stop the car before striking the child, then the railroad company would not be negligent for not stopping the car.” And again, “The motorman should exercise ordinary care, in view of the danger to be apprehended, and have his car under such control as to be able to stop it at a reasonable distance at all times.” And again, he charged that if the child left a place of safety on the street which was in plain view of the

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motorman, if he was maintaining a proper lookout, and went directly or diagonally in the direction of the street car track ahead of a moving car, the necessity for action at once arose on the part of the motorman, and it became his duty to take such steps or adopt such measures as, in the judgment of a man of ordinary care and prudence engaged in that business, it would most likely take to stop the car and prevent a collision. He said further that if the jury found that the failure to reverse was due to excitement caused by the child suddenly hurrying in front of the car and imperiling her life, and this caused him to do the wrong thing and the one that caused her death, the fact of not reversing would not of itself be negligence, nor would doing the wrong thing under the excitement caused by her act make the road liable, and if reversing the car would not have prevented the collision, the failure to reverse cannot be the producing cause of the injury, and the company would not be negligent for not reversing.

This exposition of the law was, as a whole, fair to the street car company, and some features of it are more favorable to it than could be sustained under a close and critical analysis of it. The principal objection to the charge as raised by criticisms upon the charge itself, and brought out by the special requests, are that too high a degree of care was required of the motorman, and that the doctrine of proximate cause was not correctly and point-

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edly stated. It is said it is requiring too high a degree of diligence to say that a car must be stopped in the shortest time and space possible, inasmuch as that would require a car with the best appliances in existence, a motorman of iron nerves and the coolest judgment, and that all that should be required is that ordinary care and effort, under the circumstances, should be required. The language must be taken in its connection, and in the connection used it is not, as we think, too strong, nor does it exact too high a degree of diligence. The charge as given is substantially that it is the duty of the motorman to keep a vigilant lookout for children in, upon, or using the street, and upon the first appearance of danger or probable collision with any one of them, to stop his car in the shortest time and space possible. To stop his car in the shortest time and space possible would be but the exercise of ordinary or reasonable diligence under the emergencies mentioned by the trial Judge, and this means simply that the motorman must do all in his power under the emergencies surrounding him to save human life. It must also be read in connection with the other portions of the charge to which he has referred, which states conditions and circumstances which would excuse the motorman and render the company free from liability.

The statute fixes the degree of diligence required of railroad companies, to wit: That in certain contingencies, in order to prevent accidents, every pos-

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sible means shall be employed to stop the train and prevent an accident. Shannon, § 1574, Subsec. 4.

The doctrine of proximate cause, we think, was clearly stated by the learned trial Judge, though not in the exact language of counsel, which it was not error to decline, so long as the proper rule was intelligently stated to the jury. We think the charge is not susceptible of the construction counsel puts upon it, that it charges the doctrine of comparative negligence, but the use of the term "rather than," taken from the language of this Court upon a former hearing of this case, lays down the rule, not of comparative negligence, but of proximate and remote cause.

It is objected that the trial Judge improperly said to the jury, that it was natural for them to have their sympathies aroused in behalf of the suffering. This was followed immediately by the further statement, as follows: "This is entirely proper, still, as jurors, you must never lose sight of your duty and obligations under your oaths, which is to try the case and a true verdict render, according to the law and evidence." And the argument is that he should have said they must not allow their sympathies to enter into the consideration of the case. He was not asked to so charge, and no further charge was asked on this feature of the case. In another part of his charge, the trial Judge cautioned the jury not to allow their sympathy to prejudice or affect their verdict. There is

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no reversible error in this. We do not mean, however, to approve the use of the expression by the trial Judge, that their sympathy was entirely proper. *Young v. Cowden*, 14 Pickle, 582.

Other assignments are made which, in view of what we have already said, need not be specially commented on. They refer to special requests to make specific charges. We have examined them, and think all that should have been given were properly embodied in the main charge; that it was no error to decline to give them, in the language of counsel, the second time. We see no reversible error in the case, and the judgment is affirmed with costs.

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102	328
117	732

TURNAGE v. KENTON.

(Jackson. April 19, 1899.)

1. BOUNDARY. *Calls.*

A call to run with a creek controls a call for course, where the line has not been marked. (*Post*, pp. 332, 333.)

Cases cited and aproved: Blount v. Medlin, 2 Tenn., 199; Hebart v. Scott, 95 Tenn., 467; Massengill v. Boyles, 4 Hum., 206.

2. LIMITATIONS, STATUTE OF. *Adverse possession under color of title.*

Adverse possession for the requisite period of seven years, within the boundaries of a deed describing the land as a single tract, operates to perfect title in the possessor to the entire tract, notwithstanding the lands had been originally granted by the State to different persons and in several tracts. (*Post*, pp. 333, 334.)

Code construed: § 4456 (S.); § 3459 (M. & V.); § 2763 (T. & S.)

Cases cited and approved: Brown v. Johnson, 1 Hum., 261; Ramsey v. Monroe, 3 Sneed, 329; Nelson v. Trigg, 4 Lea, 706.

FROM TIPTON.

Appeal from the Chancery Court of Tipton County.
JNO. S. COOPER, Ch.

SANFORD & YOUNG for Turnage.

CHAS. B. SIMONTON & SON for Kenton.

McFARLAND, Sp. J. This bill was filed on the third of October, 1893, by H. M. Turnage against

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T. R. Kenton and N. B. McCormick to recover possession of a tract of ninety-four acres of land, part of an 1,878-acre tract, and to remove cloud from title. The main facts as shown on the record are that on the first of September, 1845, grant No. 1345 was issued from the State of Tennessee to Thomas P. Shelton and Constantine Paine for 300 acres of land in Mississippi bottom, Tipton County, Tennessee, lying northerly and westerly of what was known as Bear Creek and between Old River on the west and Black Branch Lake on the east.

On the nineteenth of November, 1849, A. C. McDonald and wife conveyed to Constantine Paine 1,878 acres of land, which, complainants claim, includes this Shelton and Paine tract and the ninety-four acres in controversy. On the fifteenth of March, 1882, James Paine conveyed to H. M. Turnage this 1,878 acres and Turnage went into immediate possession of same. There was at the time Turnage took possession some 150 to 200 acres cleared of this 1,878 acres, and Turnage cleared up several hundred more acres and having in cultivation between 500 and 600 acres and held continuous possession to the bringing of this suit.

In 1891, defendants, Thos. R. Kenton and N. B. McCormick, made an entry and survey of the 94 acres in controversy, and on June 3, 1893, procured a grant from the State of Tennessee, and this is the cloud complainant seeks to remove. There is no deraignment of title of this 94 acres by com-

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plainant, except by showing the grant to Sheldon and Paine to the 300 acres, and the deed from James Paine to complainant of 1,878 acres, including this 300 acres, in 1882. The contention of the complainant is that this 94 acres is part of the grant of 1,345 acres to Sheldon and Paine, and a part of the 1,878 acres included in the deed from Paine to complainant; that having shown grant to the tract in controversy, and then shown deed to him of same, the other lands to the aggregate amount of 1,878 acres is included, recorded in 1882, and then shown actual inclosure, occupation, and cultivation of a part of the 1,878 acre tract, from 1882, to filing bill in 1893, more than seven years, he sufficiently deraigns his title. The contention of the defendant is that the possession and occupancy of a part of the 1,878 acres, which lay outside the 300-acre grant, cannot be coupled with the grant so as to perfect his title to that part of the grant, though both are included in the deed to 1,878 acres. In other words, that complainants must not only show a grant to the 300 acres, but must also show actual occupancy and possession of a part of this 300 acres so granted under color of title to himself, in order to claim benefit of seven years' statute, which, under the authorities, gives title to the whole land described in muniment of title, where only a part is occupied for the seven years. The first contention of defendant is that this 94 acres is not

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included in either the grant to the 300 acres or the deed from Paine to Turnage of the 1,878 acres.

This is a question of fact, to be determined by the proof, and necessitated the reading and study of this voluminous record of over 400 pages.

The grant to this 300 acres, beginning on the bank of Old River, runs east to a defined point, thence south 60 poles to a stake, thence in a southwesterly direction with the meanderings of said lake to Bear Creek, thence west with the meanders of said creek to Old River, etc.

The two deeds from McDonald to Constantine Paine in 1849, and from James Paine to Turnage in 1882 of the 1,878 acres, have for their southern boundaries this 300 acres, being the southern part of the 1,878 acres, substantially the same calls. Recent surveys of this southern portion of these tracts, especially the survey made by J. A. Green, county surveyor, made in 1887, seems to show that from the point 60 poles from the cottonwood the meanderings of the lake are first in a southwesterly direction around the foot of the lake, thence for some distance in a southeasterly direction to what is now known as Bear Creek, and that this Bear Creek runs in a southern slightly eastern direction to Old River.

The defendants claim that when this grant of the 300 acres was made, in 1845, there was a creek called Bear Creek which did run westerly from the lake to Old River, as called for in the grant, and

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that between this, the northern creek, and the one now called Bear Creek, on the south, lay the 94 acres they entered. They claim that by many years of overflow and other natural causes this northern creek has been filled up, until it is now a mere depression though plainly visible.

There was much proof taken on both sides, and there was some contradictions of fact. It is sufficient to say of this proof that it clearly appears that the whole of this 300 acres to the present Bear Creek, including the 94 acres in controversy, has always been known as the Paine and then Turnage land; that Turnage so claimed to Kenton before Kenton's entry, and that the present Bear Creek has always been known as such, and this testified to by the most reliable, by reason of better acquaintance with facts, of defendant's witnesses as well as complainant's.

It also, we think, satisfactorily appears that what is now claimed to be the old bed of Bear Creek, and which defendants claim was the southern boundary of 300-acre grant, was never the Bear Creek called for in this entry and grant, but was a mere slough, through which the water ran from the lake to Old River during high water.

If the creek now known as Bear Creek is the one referred to in the entry and grant, the lines then run with the creek, though in different directions from those given in entry, grant, and deeds. Calls for natural objects, such as bank of stream,

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will control over calls for direction. Washburn Real Prop., Sec. 631; *Blount v. Medlin*, 2 Tenn., 199; *Hebart v. Scott*, 11 Pickle, 467; *Massingill v. Boyles*, 4 Hum., 206.

In this last case it was held that where a call for course would deviate from a creek called for, parol evidence will not be admitted to set up the line that would be followed by the course unless it was at the time of the grant actually surveyed and marked.

We conclude, then, upon this question of fact that this 94 acres was included in the grant to the 300 acres and in the deeds to the 1,878 acres.

The second contention of defendant is that because the land actually inclosed and occupied for seven years continuously by the complainant was not a part of this 94 acres in controversy, the complainant cannot recover, although the land so occupied, and also the 94 acres, was a part of the 1,878 acres included in complainant's deed from Paine to Turnage. This contention of defendant is, we think, unsound.

The prerequisites to recovery in ejectment are to show that the land in controversy has been granted, and, having shown that the State is no longer interested and that the statute of limitations are operative upon the land by reason of the grant, then show either a continuous title or color of title in complainant with seven years' actual occupancy of some part of the land under color of this title.

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The grant and the color of title need not be identical in boundaries. It is sufficient if both cover the land in controversy. Nor is it necessary that the occupancy shall be of a part of the grant. The grant, if not to complainant, merely puts title so that statutes of limitation may begin to operate. The occupancy is coupled only with the color of title. Seven years' adverse possession under color of title vests in the holder absolute title in fee, not only to the land actually, but the extent of the boundaries set out in the assurance of title. Code (Shannon), 4456; *Brown v. Johnson*, 1 Hum., 261; *Ramsey v. Monroe*, 3 Sneed, 329; *Nelson v. Trigg*, 4 Lea, 706.

To hold that the clearing or inclosure must be on every separate grant composing a large tract embracing several grants conveyed in one deed, would be contrary to the holding of former decisions and to the express words of the statute (Code, § 3459), which says: "Anyone holding land, by himself or . . . is vested with a good and indefeasible title in fee to the land described in his assurance of title." It is sufficient if complainant has shown grant to the land in controversy and a color of title with seven years' adverse possession of a part of land covered by his deed, whether that actually occupied is a part of the grant or not.

We do not think the case of *Carter v. Ruddy*, 166 U. S. Rep., 493, holds contrary to this ruling. In that case the conveyance was of a block of land

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divided into lots and so described. These lots were laid off and so marked on the ground. There was adverse holding of some of these lots so marked and designated, and it was held that this holding did not cover the other lots. Here the deed was to an 1,878-acre tract, the whole tract being described by metes and bounds. The decree of the Chancellor is affirmed with costs.

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102	336
110	617

102	336
116	514

MEMPHIS v. AMERICAN EXPRESS CO.

(Jackson. April 19, 1899.)

1. TAXATION. *Repeal of power of municipality to tax a privilege.*

A provision in a general revenue law imposing on a business or occupation—*e. g.*, express companies—a specific privilege tax for State purposes, to be paid to the Comptroller “in lieu of all other taxes except *ad valorem* tax,” has the effect to exempt such business or occupation from taxation as a privilege by municipal corporations, and to repeal any existing provision by statute or ordinance imposing such tax on behalf of the municipality. (*Post*, pp. 339–341.)

Acts construed: Acts 1897, Ch. 2, Sec. 6; Acts 1879, Ch. 84, Sec. 7; Acts 1893, Ch. 84, Secs. 4, 5.

Cases cited: *Hunter v. Memphis*, 93 Tenn., 573; *Memphis v. Bing*, 94 Tenn., 645; *Railroad v. Harris*, 99 Tenn., 685; *Reelfoot Lake*, etc., *Dist. v. Dawson*, 97 Tenn., 151.

2. STATUTES. *Repeal.*

The general and usual clause repealing all laws in conflict with the particular statute has no effect whatever. (*Post*, p. 341.)

Constitution construed: Art. II., Sec. 17.

Act construed: Acts 1897, Ch. 2.

Case cited: *State v. Yardley*, 95 Tenn., 548.

3. SAME. *Same.*

Under the title “An Act to provide revenue for the State of Tennessee and the counties thereof,” it is competent for the Legislature to enact that privilege taxes on certain occupations shall be laid for State purposes only, and thereby repeal, by implication, existing laws or ordinances imposing privilege taxes on the same occupations for municipal purposes. (*Post*, pp. 341, 342.)

Constitution construed: Art. II., Sec. 17.

Act construed: Acts 1897, Ch. 2.

Case cited and approved: *State v. Yardley*, 95 Tenn., 553.

Cited and distinguished: *Knoxville v. Lewis*, 12 Lea, 180; *Burke v. Memphis*, 94 Tenn., 692.

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4. SAME. *Same.*

A statute purporting to be, and manifestly intended as, a revenue measure will not be treated as an exercise of police power to rescue it from implied repeal by a general revenue Act, even if it does incidentally accomplish the ends of a police measure. (*Post*, p. 343.)

5. EXPRESS COMPANY. *Taxation of their wagons.*

An express company that pays a privilege tax on its business as a unit will not be held liable, in the absence of a clearly expressed legislative intent to impose further burden, for a tax on vehicles imposed by another clause of the same statute. (*Post*, pp. 343, 344.)

Case cited: *Bell v. Watson*, 3 Lea, 328.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby County. L. H. ESTES, J.

JNO. H. WATKINS for Memphis.

FRANCIS FENTRESS for Express Co.

CALDWELL, J. The American Express Company brought this suit against the city of Memphis to recover the sum of \$57, paid under protest by the company to the city as a license tax for the year 1898 on the company's eight wagons run over the streets of the city in gathering up and delivering express packages. The Circuit Judge, who tried the case without the intervention of a jury, rendered judgment for the company, and the city appealed in error.

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The contention of the company was and is that the legislation under which the license tax was imposed had been repealed by the general revenue bill passed in the year 1897, but the city denied below, and denies here, that such was the effect of this subsequent legislation. The solution of this disputed question will decide the case.

By Chapter 10 of the Acts of 1879 the charter of the city of Memphis was abolished, and under the provisions of Chapter 11 of the Acts of the same year a taxing district was established for the same territory. The city of Memphis, like other municipalities in the State, had been accustomed to levy its own taxes under the authority of general State laws, but the Legislature of the State, by bills framed and passed for that purpose, levied taxes for the taxing district.

Section 7 of Chap. 84 of the Acts of 1879, enumerated, in as many subsections, fifty-eight "taxable privileges" in the taxing district, and "fixed" the amount of the tax on each. Subsections 20, 21, and 22 related to carts, wagons, drays, and certain other vehicles, and prescribed the exact tax to be paid for the privilege of using the same in the taxing district. These three subsections of that Act were amended by Sec. 1, Chap. 104, of the Acts of 1889, so as to provide that the tax to be annually paid for the use of such vehicles in the taxing district, should be \$1, \$2, or \$3 (according to prescribed classes), if the tire should be as

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much as $3\frac{1}{2}$ inches in width, and \$5, \$7.50, or, \$10 each for the same classes, respectively, if the tire should be less than $3\frac{1}{2}$ inches in width. It was under and by virtue of this provision that the tax involved in this case was demanded and received by the city.

In 1893 the Legislature of the State conferred upon the city of Memphis, as successor to the taxing district, ample taxing power, including the benefit of all laws imposing privilege taxes in favor of the taxing district. Acts 1893, Chap. 84, Secs. 4 and 5; *Hunter v. Memphis*, 93 Tenn., 573.

By that Act "the city was rehabilitated with corporate autonomy, and authorized to exercise the taxing power, as an arm of the State government." *Memphis v. Bing*, 94 Tenn., 645. Thus the city became authorized to collect such privilege taxes under the Act of 1889 as the taxing district would have been authorized to collect if its existence had been continued; and, as a consequence, the city was entitled to collect the tax here in question, unless the aforesaid provision of that Act was repealed before the accrual of the tax.

Section 6 of the general revenue law of 1897 is in these words: "The following corporations shall pay directly to the Comptroller of the State the following taxes on the following privileges: Express companies (in lieu of all other taxes except ad valorem tax), if the lines are less than 100 miles, . . . per annum, \$500; if lines are more than

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100 miles, . . . per annum, \$2,000." Acts 1897, Chap. 2, Sec. 6, pp. 74, 75.

By this provision a privilege tax is laid in favor of the State on all express companies, and that tax is declared to be "in lieu of all other" privilege taxes. The words "in lieu of all other" privilege taxes show an indisputable purpose on the part of the Legislature to exclude the right of any county or municipality to levy a privilege tax on express companies. The tax so laid in favor of the State "covers the whole domain of privilege taxation that the Legislature intends shall be occupied, and excludes every other privilege tax" on express companies until further legislation with respect thereto shall be had. *Hunter v. Memphis*, 93 Tenn., 575. To make this construction doubly sure, the thirteenth section of the Act was inserted. That section is as follows: "That whenever the words 'in lieu of all other taxes,' occur in this Act, it is hereby declared to be the legislative intention that county and municipal taxes are excluded." Acts 1897, Ch. 2, p. 80.

Having full power upon this subject (*Railroad v. Harris*, 99 Tenn., 685; *Reelfoot Lake Levee District v. Dawson*, 97 Tenn., 151), it was entirely competent for the Legislature, in its discretion, to provide that the whole of the revenue thus raised should go to the State and that no county or municipality should have any part thereof.

This enactment is in irreconcilable conflict with that

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under and by virtue of which the city collected the tax here under consideration. There is such repugnance between the two provisions that they cannot co-exist or stand together. It results, therefore, that the later enactment repealed the earlier one by implication. *Hunter v. Memphis*, 93 Tenn., 571. It was suggested in argument that an express repeal was accomplished by the concluding section of the later Act, which is in this language: "That all laws and parts of laws in conflict with this Act be, and the same are hereby, repealed." Acts 1897, Ch. 2, Sec. 18, p. 81. This provision cannot operate as an express repeal, because the Act does not meet the constitutional requirement (Const., Art. II., Sec. 17), that the title or substance of all laws repealed shall be recited in the caption or body of the repealing act. The presence of this repealing clause in the Act is of no force whatever. *State v. Yardley*, 95 Tenn., 548.

It is no answer to the conclusion that there was an implied repeal, to say that the subject of municipal taxation was not mentioned in the title of the Act of 1897. The title of that Act is as follows: "An Act to provide revenue for the State of Tennessee and the counties thereof." Confessedly, this title is broad enough to cover any provision that might be made to raise revenue for the State, and the declaration in the body of the Act, that any specific privilege tax laid for the State should be in lieu of all other privilege taxation on the same

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business or occupation, is obviously within the scope of that title. It is clearly germane to the subject presented in the title, and that is all that the Constitution (Art. II., Sec. 17, cl. 2) requires. It is sufficient compliance with the constitutional requirement that the title disclose the general object of the bill. Recitation of details as to the mode and manner of accomplishing that object need not be made in the title. The details are for the body of the bill, and, so long as they are germane to the subject expressed in the title, the legislation is in accord with the mandate of the organic law. *State v. Yardley*, 95 Tenn., 553, 554; Black's Const. Law, Sec. 107; Cooley's Const. Lim. (5th Ed.), p. 174.

The decisions made in the case of *Knoxville v. Lewis*, 12 Lea, 180, and *Burke v. Memphis*, 94 Tenn., 692, are not in conflict with this well-established rule. In the former of these cases it was held that a provision for the collection of municipal taxes could not be incorporated in the body of a bill whose title related alone to State and county revenue; and in the latter it was held that a bill with a like title, did not, by the mere failure to mention the business of architects as a taxable privilege, impliedly repeal former laws authorizing the taxing district, to whose right the city succeeded, to collect a privilege tax from persons following that business. Neither of those cases is like the present one.

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Nor can it be truly said that the provision of the Act of 1889, here involved, was a police regulation to prevent the use of narrow-tired vehicles upon the streets, rather than a law taxing privileges, and that, therefore, that provision was unaffected by the Act of 1897.

It is true a much larger sum was laid in that provision for the use of narrow than of broad-tired vehicles, and the difference may have been made to discourage the use of the former kind; yet it does not follow that the sum exacted in the one case or the other was a police charge and not a privilege tax. In the Act of 1889 and in the Act of 1879, amended thereby, the use of all such vehicles in the taxing district was distinctly called a privilege, and as a privilege was subjected to the designated tax. This shows the legislative intent, and is controlling.

Finally, the privilege of doing business as an express company includes the privilege of operating such wagons and other vehicles as may be essential to the orderly and efficient dispatch of that business; and, from this, it follows that a privilege tax laid on that business as a unit, as was done by the Act of 1897, covers the right to operate those necessary vehicles.

This principle was applied in *Bell v. Watson*, 3 Lea, 328. There the Court held that the payment of a tax for the privilege of operating a livery stable protected the owner from additional privilege

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taxation on the buggies used in the business of the stable, it not appearing that the Legislature intended to impose the additional tax.

The company now before the Court paid to the State, for the year 1898, the sum required by the Act of 1897 as a privilege tax, and thereby relieved itself of all liability for privilege taxation for that year.

Affirmed.

McCarthy v. Catholic Knights.

McCARTHY v. CATHOLIC KNIGHTS.

*(Jackson. April 22, 1899.)*1. CHANCERY PRACTICE. *Amendment of answer.*

The Court's refusal to permit amendment of answer at the hearing constitutes no abuse of discretion where it would necessitate a continuance, and the matter of the amendment had long been within defendant's knowledge, and no reason is assigned why it had not been presented earlier. (*Post*, pp. 349, 350.)

2. LIFE INSURANCE. *Applicant's statement as to age.*

The statement as to the applicant's true age, made in an application for membership in a fraternal insurance order, which declares that the statement and representations made therein shall be the basis of the contract, is a part of the contract of insurance, although the same is not incorporated or referred to in the policy or certificate issued to the applicant. (*Post*, pp. 350, 351.)

3. SAME. *Same.*

A misstatement as to the applicant's age in an application for membership in a fraternal insurance order, which is made a part of the contract of insurance, will not defeat a recovery under the policy, notwithstanding that, contrary to the statement, she had passed the age limit prescribed by the constitution of the order, where she did not know her exact age, the application was made out on one of the association's blanks, and presumably by some of its officers or members, the date and place of her birth were not filled in the blanks, and the facts as to her character and age were, under the provisions of the constitution, referred to a committee, upon whose report the certificate was issued upon which dues were paid for nearly seven years. (*Post*, pp. 350-357.)

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Cases cited and approved: *Insurance Co. v. Booker*, 9 Heis., 628; *Boyd v. Insurance Co.*, 90 Tenn., 212; *Insurance Co. v. Morris*, 3 Lea, 101.

FROM SHELBY.

Appeal from the Chancery Court of Shelby County.
LEE THORNTON, Ch.

PIERSON & EWING for McCarthy.

PERCY & WATKINS and EDGINGTON & EDGINGTON
for Knights and Ladies.

McFARLAND, Sp. J. This was a bill filed by Mary McCarthy, individually and as administratrix of Ellen Rogers, against Catholic Knights and Ladies of America and Bridget Conner to recover of said association, a fraternal insurance order, the sum of \$2,000 upon a benefit certificate issued by the order in 1891 upon the life of Ellen Rogers, payable upon death of assured to her two nieces, the complainant, Mary McCarthy, and defendant, Bridget Conner. The latter had at first refused to join in the bill, and was made defendant, but subsequently joined in the prosecution of the claim and suit.

The application for membership was made by Ellen Rogers on June 21, 1891, and appears to have been signed by her "Ellen Rogers." This ap-

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plication was made upon one of the association's printed blanks and premises by saying: "Having read the constitution and laws of your order, the subordinate constitution and your by-laws, and being fully acquainted with the objects of your order, and fully indorsing them, I desire to become a member. . . . And, furthermore, do pledge myself (under pain of forfeiture of all rights of membership and benefits) that the following statements are true." Then follows a number of questions and answers, in which she gives her age as 49 next birthday, but the answers as to place and date of birth are left blank. She further agrees "that the statements and representations made in the foregoing application and declaration shall be the basis of the contract between me and said Supreme Council Catholic Knights and Ladies of America, the truthfulness of which statement and representations I do hereby warrant," etc.

Upon this application there is the following:

'*Note.*—In case of doubt as to the age of the applicant, the investigating committee must reject or require proof as provided in Sub. Con."

There follows a report of the investigating committee which was appointed, in which they say "they have attended to that duty and find her qualified to become a member."

Another indorsement of instructions appears upon this application, as follows: "If committee are not satisfied as to applicant in regard to character or

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age, or any other reason, they should reject the candidate at once.”

The constitution of subordinate branches provided that “no person shall be admitted to this branch unless sound in bodily health, free from all infirmities or disease, between the ages of 18 and 50 years.” It further provides for the investigating committee, and says: “The committee shall present report, which shall be final.”

There was also a medical examination, made by the association's medical examiner, Dr. Willett, who makes his report, and, in this report, he puts her age as 49. Appended to this report, and a part of same, appears another declaration of assured as to truth of the statements in her application itself. This declaration is signed “Ellen Rogers. Her X mark.”

Upon this application and these several reports a certificate of membership is issued to the assured, simply reciting that the assured is a member in good standing and in case of death of member \$2,000 is to be paid her neices, Bridget Conner and Mary McCarthy. There are no stipulations in the certificate as to any representations or warranties. Under this certificate she was duly initiated on the sixteenth day of August, 1891, and paid her proper dues, and these were regularly paid up to January 30, 1898, amounting to over \$100. The assured died in 1898.

On hearing there was a decree for defendant. The

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only defense made by the answer necessary to be noticed is that at the date of her application, June 21, 1891, the assured was more than 49 years of age, was, in fact, more than 50 years old, and that her statement in her application for membership as to her age was a warranty of its truth, was material, and was untrue, and, for this reason, this policy was void.

When the cause came on for hearing the defendant asked leave to amend its answer so as to show that Mary McCarthy and Bridget Conner were the nieces of Mrs. Rogers, who was dependent on them, and who paid the premiums on the policy. They had no insurable interest in her life. The policy is a contract of wager, and cannot be recovered on. The Chancellor refused to allow this amendment, to which exceptions were reserved and these proceedings incorporated into the record by a bill of exceptions.

There is no assignment of error upon the part of the defendant to this error complained of, and we cannot consider same now in aid of other defenses raised in the answer to the contention of complainant. If we were to concede, however, that this question is now open, its determination would not help defense. The application to make the amendment came after all the proof had been taken and the cause regularly called for hearing. The facts, if true, must have been known to defendant long before the application. There was no cause shown

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why the application was not made sooner. To have granted this would have probably necessitated a continuance for further proof on behalf of complainant. It was a matter of discretion in the Chancellor, and no such abuse of this discretion appears as would cause this Court to pronounce it error. The only question for determination, then, is that raised as to the age of the assured at the date of her application.

It is contended on behalf of defendant that her statement as to age was a warranty, was material, and was untrue. The contention of complainant is that it was not incorporated in the policy or certificate, but appeared only in the application, and was, therefore, only a representation, and not a warranty. They also contended that the whole contract, including the constitution and by-laws of the association, which were incorporated in the contract, must be taken together, and by this constitution a previous examination as to age was had, a committee appointed, who reported upon this question of age, upon which this association acted and determined. That it was known this woman did not herself know her exact age, and for this reason the examination was made, and, by the very language of the constitution itself, clause 74, this report "shall be final." The complainant contends further that the defendant has not shown that the age as given was not true.

We are of the opinion that the representation made

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by the assured as to her true age was a part of the contract of insurance, and that it was a material part. Says Bacon: "Where it is provided that if any of the statements made by the applicant as the basis of the contract, shall be found in any respect untrue, then the policy shall be void. A misrepresentation as to the age will void the policy. The question of age is so material that a false statement in regard to it will be fatal, whether regarded as a representation or a warranty. Where an applicant for admission to a voluntary association for mutual relief, the rules of which did not admit members over 60 years of age, stated his age in his application to be 59 years, when, in fact, he was 64 years old, it was held by the Supreme Court of Maine that the misrepresentation voided the contract for insurance issued thereon." *Benefit Soc. & Ins. (Bacon)*, 225; *Sweett v. Citizens' Mut. Rel. Soc.*, 78 Me., 541.

In this Maine case the Court says: "The age of the applicant was a material fact. If more than 60 he could not become a member. This representation of a fact was a warranty of its truth, and if not true the contract was invalid. This rule is so uniformly held by the Courts that no authorities need be cited." *McCoy v. Rom. Cath. Ins. Co.*, 132 Mass., 272; *Kobok v. Phoenix Mut. Co.*, 4 N. Y. S., 718; *Ætna Ins. Co. v. French*, 91 U. S., 510; *Southern Life Ins. Co. v. Booker*, 9 Heis., 628; *Boyd v. Ins. Co.*, 6 Pickle, 212.

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It may be said, however, that this rule, though well established, is not applicable to every case of misrepresentation as to age. This rule, like every other rule in principle, is subject to modification, or is not applied when made under special circumstances of ignorance, misrepresentation or mistake, where this want of knowledge is known to the insurer. Thus, in *Miller v. Phoenix Mutual Life Ins. Co.*, 107 N. Y., 292, where the agent of an insurance company filled in the application and the applicant was an old man, who spoke English imperfectly, and told the agent he did not know his age, and the agent inserted an age which turned out to be erroneous. So where (as in *Brant v. Guaranty Mut. Ins. Co.*, 7 N. Y. App., 847) the agent made a miscalculation, and where the applicant was an ignorant man and the agent computed his age and inserted it wrong (as in *Keystone Mut. Ben. Asso. v. James*, 72 Md., 363), in these and like cases the company was estopped from claiming advantage of the misstatement.

So in a great number of other cases, under varying circumstances, where it was shown that the error of statement was inserted by the agent of the company upon facts as honestly given by the insured, the policy was not invalidated. See note to *Colemans v. Supreme Assembly*, 16 L. R. A., 33, for a great number of authorities on this point.

The case presented here is very similar, though not so strong in favor of the assured, in some of

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its features, as the Miller case, *supra*. Here the applicant was an Irish woman that had come from Ireland in her youth, ignorant and uneducated, who could neither read nor write. There are several facts in the record demonstrating she did not know her exact age, and her nearest kin so testifies. Her application was made out on one of the association's blanks, and, presumably, by some of the officers or members of the association. The date and place of her birth was not filled in the blanks. The facts as to her character and age were, under the provisions of the constitution of the association, referred to a committee composed of members, and *pro hac vice* officers, of the association, and, upon an investigation of these facts and their report on the fact as to her age, the certificate was issued to her, and upon this certificate the dues were paid for a period of nearly seven years to her death. These facts should, it would seem, bring the case within those numerous cases which hold the association estopped from questioning the age of the assured after her death. Independent of this question, the inquiry still remains whether the defendant has established the fact that the insured was over 49 years of age when she made her application. Was this statement in fact false?

It is an elementary principle that forfeitures are not favored in the law, and, in order to work a forfeiture of the rights of membership in a mutual association, it must clearly appear that such was the

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meaning of the contract, and the facts upon which a forfeiture is claimed must be proved by the most satisfactory evidence. 3 Am. & Eng. Enc. L. (2d Ed.), 1086; *Bates v. Detroit Mut. Ben. So.*, 51 Mich., 587; *Jackson v. The N. W. M. R. Asso.*, 78 Wis., 468; *Benefit So. & Life Ins. (Bacon)*, 198; *Southern Life Ins. Co. v. Booker*, 9 Heis., 606; *Ins. Co. v. Morris*, 3 Lea, 101.

In this last case the question was whether the answers of the assured were false or fraudulent. The Circuit Judge had charged the jury that the burden of proof was on the defendant, and that the plaintiff was entitled to recover unless the proof positive shows that Blount Morris, "the assured, made false or fraudulent answers to the questions," and this charge was sustained.

There were three classes of evidence adduced in this case by the defendant to show that the assured was, in fact, over 49 years of age when the application was made.

1. The testimony of several witnesses who had known the assured for a number of years.

2. Two copies of marriage licenses issued by the County Court of Shelby County, Tenn., one of date February 4, 1854, between Stephen Leonard and Ellen Walsh, and the other date January 12, 1859, between Martin Rogers and Ellen Walsh, and two certificates purporting to be taken from the registry of marriages of St. Peter's Parish, testified to by Father Sheehan, and dated February 6, 1854, be-

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tween Stephen Leonard and Helenam Walsh, and the other dated January 12, 1858, between Martin Rogers and Eleen Walsh.

3. A deposition made by the assured in the Probate Court of Shelby, on May 29, 1897, in which the assured was proving a claim against an estate, and in which she gave her age as 60 years.

As to the first class of testimony, that of witnesses as to her age, this was of witnesses testifying in 1879 as to the apparent age of assured when they first knew her forty to fifty years before. None of these witnesses, except one Eleen Curry, had more than a general acquaintance with assured, and had but an indefinite remembrance when she married Martin Rogers, and they could only say she was grown at that time. None of them knew her age or place of birth. The testimony of all these witnesses is too indefinite and confessedly uncertain as to date and facts to prove anything.

Another witness, Ellen Curry, an old and ignorant Irish woman, testified that she came over from Ireland in 1853 or 1854, she couldn't remember which, with assured, and says assured was older than witness; that she was bigger, and a little older, but nowhere states how old she herself was; says assured first married a man by name of Leonard, and afterwards a man by name of Rogers, but don't know first name of either. This witness does not attempt to give the age of assured at any time. The evidence of all other witnesses is only circumstan-

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tial, and too indefinite to be worth anything. As to the marriage licenses and certificates, there is no evidence certainly establishing that the Ellen Walsh mentioned in the license of 1854 was the same as the assured. In the certificate from the parish registry Hellen Walsh is given as the woman who married Stephen Leonard in 1854.

One of plaintiff's witnesses, Bridget Conner, testifies she always heard the first husband was named Peter Leonard, while the witness for defense says Stephen Leonard had a cousin named Peter Leonard. Another witness for defendant says she heard assured say her first husband was Stephen Leonard. Upon this evidence it is argued that if Ellen Walsh married in 1854 she must have been over 49 in 1891, as she could only have been 12 years old in 1854, if only 49 in 1891. Upon the other hand, Ellen Curry, who came from Ireland with assured in 1854, says she was only a girl then.

To say the most of this testimony, taken as a whole, it is not of that clear and positive character as to her age as is required under the authorities cited to prove the falsity of her statement in the application, and demand a forfeiture of the rights under the policy. Upon the other hand there is in the record the testimony of all the living relatives of assured that she was not, in their opinion, more than 49 years old in 1891, with the investigation and report of the committee composed of her neigh-

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bors and acquaintances, made at the time upon this question of age.

The evidence under the third class of evidence in the cause—the oath of the assured made in May, 1897, as to her age, and that she was 60 years of age at that time—is equally inconclusive, giving it all the force of a sworn statement made by a party in interest.

This statement by her in her deposition, naming her age as 60, was one of those preliminary and formal questions and answers entirely immaterial to the matters in controversy in the Probate Court. The proof in the record, as has already been shown, abundantly establishes the fact that she did not in fact know her age. And as evidence of her ignorance and inaccuracy of statement as to dates and prominent occurrences of her own life, in the very next clause of the same answer she states that she had been living in Memphis fifty years, while according to defendant's evidence in the cause she came to Memphis in 1854, and had thus been living in Memphis, when that deposition was given in 1897, only forty-three years, a difference of seven years. This is clearly not such a solemn statement or admission as would estop her from denying its truth.

This disposes of all the material contentions of defendant and in favor of the complainants, and the decree of the Chancellor will be reversed and decree entered here in favor of the complainants for amount claimed and costs.

Bedford v. McDonald.

BEDFORD v. McDONALD.

(*Jackson*. April 28, 1899.)

1. **PARTNERSHIP.** *Creditors' lien upon firm assets.*

The creditors of a firm cannot, after the members thereof have divided the assets among themselves, waiving or failing to assert any lien they have as partners, set up and enforce such lien, even if the firm was insolvent, unless the division was a fraud upon them. (*Post*, pp. 360-365.)

Cases cited and approved: *Gin Co. v. Bannon*, 85 Tenn., 712; *House v. Thompson*, 3 Head, 512; *Gill v. Latimore*, 9 Lea, 381.

2. **SAME.** *Purchaser of firm assets from partner not innocent, when.*

One who, with knowledge that a firm had dissolved and was insolvent, accepted in payment of an antecedent debt a transfer from one of the partners of a note which originally belonged to the firm, but which had been allotted to the transferer in a division of the firm assets, cannot claim to be an innocent purchaser without notice entitled to protection against the firm creditors, if the division of the assets between the partners was fraudulent, although his debt was a *bona fide* one. (*Post*, pp. 365, 366.)

Case cited and approved: *Allen v. Bank*, 6 Lea, 558.

3. **SAME.** *Firm creditor not estopped to claim partnership asset, when.*

A firm creditor will not be estopped to follow a note originally belonging to the firm in the hands of a transferee from one of the partners, after a fraudulent division of the assets by the partners, or to assert that a judgment recovered thereon should be applied to the firm debts, merely because he appeared for the maker of the note, who was his nephew, in the action by the transferee thereon, and did not challenge the latter's ownership until judgment had been recovered and had been secured by a stayor, where it does not appear that any concessions were granted by the plaintiff in that action in order to quiet his title to the note, or that anything was said on the trial as to the true ownership of the note and no cost or

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expense was incurred on account of anything done or said by such creditor. (*Post*, pp. 366, 367.)

Cases cited and distinguished: *Barham v. Turbeville*, 1 Swan, 439; *Fields v. Carney*, 4 Bax., 137; *Galbraith v. Lunsford*, 87 Tenn., 104.

4. **INJUNCTION.** *Effect and extent of.*

An injunction prohibiting one from receiving any of the proceeds of sale under execution upon a judgment recovered by him, does not prevent him from bidding at the sale as any third person might, but, instead of crediting his judgment or applying it in payment, he will be required to pay the amount bid into Court and await further orders before any credit can be given. (*Post*, p. 368.)

5. **JUDGMENT.** *Stayer's obligation.*

The stayer of a judgment obtained by a fraudulent assignee of the debt is liable thereon to the assignor's creditors who successfully impeach the transfer of the claim. (*Post*, p. 368.)

6. **EXECUTION.** *Sale under, invalid, when.*

Sale of land under execution will be set aside at the suit of the plaintiff in the judgment, where it was made under circumstances that virtually prevented him from bidding on it, and a bid made by a third party failed to satisfy the judgment. (*Post*, p. 369.)

FROM SHELBY.

Appeal from the Chancery Court of Shelby County.
JNO. L. T. SNEED, Ch.

R. M. HEATH for Bedford.

J. H. MALONE for McDonald.

WILKES, J. T. T. and J. M. McDonald were partners in business at Collierville, Tenn., under the

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firm name and style of McDonald Bros. They failed in business and dissolved partnership December 4, 1894. T. M. McDonald is a son of T. T. McDonald. He was also a merchant, and owed the firm of McDonald Bros. a debt. W. H. Bedford owed a debt to T. M. McDonald. On February 7, 1895, W. H. Bedford, being indebted also to McDonald Bros. and to the individual members of that firm, executed his notes, one to T. T. McDonald for \$523.87 and one to J. M. McDonald for \$625. T. T. McDonald kept the note for \$523.87 and used it as collateral from time to time, and, after about two years, being indebted to his son, T. M. McDonald, he transferred it to him in payment of his debt. About \$25 of this note represented an individual debt that W. H. Bedford owed T. T. McDonald, and the balance of \$498.87 was the one-half of the debt due from W. H. Bedford to McDonald Bros. The other half was included in the \$625 given to J. M. McDonald. In other words, W. H. Bedford being indebted to the firm of McDonald Bros. in the sum of \$997.74, this amount was divided between the two partners equally and included in notes given to each for this amount and the amount due each individually. W. H. Bedford having failed to pay the note for \$523.87, T. M. McDonald sued him on it. On the trial before the Justice of the Peace, complainant, who is the uncle of W. H. Bedford, appeared for him and represented him and had various credits

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entered, and, as a final result, judgment was rendered for \$599. Execution was stayed by Mrs. Virginia Bedford, the sister-in-law of complainant. After the stay expired execution issued and was returned indorsed no personal property to be found of either defendant. A levy was then made on land of Mrs. Virginia Bedford, and it was condemned and advertised for sale on January 13, 1898.

On January 10, 1898, H. L. Bedford filed a bill claiming that he was a creditor of McDonald Bros.; that as such he had a lien on this judgment, as partnership assets, and on behalf of himself and all other creditors of McDonald Bros. sought to have the proceeds of sale paid upon the partnership debts, and enjoined T. M. McDonald, the judgment creditor, from receiving or collecting any of the proceeds of sale. The bill charged in detail that the judgment was really firm assets; that T. M. McDonald paid nothing for it; that its transfer to him was a fraud and made to hinder and delay creditors of McDonald Bros. and T. T. McDonald, and that T. M. McDonald participated in and aided this fraud.

T. M. McDonald answered and claimed that H. L. Bedford was present at the time the judgment was rendered in his favor on the \$523.87 note and made no claim that it was partnership assets or that he had any lien upon it. The answer was filed as a cross bill, and denied any right in the complainant or any creditors of McDonald Bros. to

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reach the note as firm assets; that it had been transferred to him in good faith to pay an honest debt, and claimed that the sale of the land was void for imperfect description and because it had been conveyed in trust, and the cross bill asked for a resale of the land free from redemption. It was, when sold under execution, struck off to S. P. Wilson for \$300, and, he not complying with the terms of sale, it was resold to H. L. Bedford for the same sum of \$300. Mrs. Bedford, in her answer to this cross bill, resisted any attempt at resale and insisted on the first sale and her right to redeem.

The Chancellor gave judgment for the complainant's debt and ordered the bill to stand as a general creditors' bill for the benefit of all creditors of McDonald Bros., and dismissed the cross bill, and defendant appealed. As error he says:

1. That the creditors of McDonald Bros. had no lien on the two notes which the partners had taken to close up the amount due them from W. H. Bedford, and especially none as against T. M. McDonald or the proceeds of sale of the lands of the stayor, Mrs. Virginia Bedford.

2. That if mistaken in this, complainant could have no lien on the judgment or note on which it was based, because the defendant had offered him enough of the note to pay the debt he claimed against the firm, and he had refused it and renounced all claim to it, and encouraged defendant to proceed in his suit against W. H. Bedford, and

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had made no claim to the note until defendant had gone to the expense and labor of obtaining the judgment levying on the land and condemning the same, and he is now estopped to claim the proceeds of the judgment.

3. That the Court did not hold the sale void because of imperfect description of the land and because it was conveyed in trust and the title had not been cleared up, and because he was virtually prevented from bidding at the sale, because he was enjoined from receiving the proceeds and the property was thus brought to sale under circumstances prejudicial to it, and which resulted in a purchase for \$300 of land worth \$3,000.

It appears from the testimony of T. T. McDonald that nothing special was said between him and his former partner when they divided up the W. H. Bedford note between themselves as to waiving or retaining any lien; that he thought he had a right to take the note and leave the firm creditors in the lurch, and that he was never willing to use the notes in paying firm debts; that the division was made in order to effect a settlement with W. H. Bedford, but not for the purpose of using up the money so the creditors of the firm could not get it.

T. M. McDonald states that he knew the firm of McDonald Bros. had failed and that they had divided the assets between themselves, and that the note of \$523.87 was given to him in payment of an antecedent debt.

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In regard to the first assignment of error, that there was no lien on this note for partnership debts, it is evident that the partners expressly retained no lien when they divided the debt of W. H. Bedford between themselves, but the fair inference is that they intended to waive any such lien. It appears also that the Chancellor did not find, in terms, that this division was made fraudulently, but simply found the facts as before stated, and the question is, whether when the partners have made such division of partnership assets among themselves, waiving or failing to assert any lien they have as partners, can the creditors of the firm set up and enforce such lien? We think they cannot, unless it be on the ground that such division is a fraud, which a Court of Chancery will not tolerate, but will treat the assets still as firm assets and liable as firm debts. In other words, the assets cannot be subjected on the ground of a lien, for that can only be worked out through the partners, and where there is no lien in favor of partners there is none in favor of firm creditors. The general doctrine is laid down in the case of the *Gin Co. v. Bannon*, 85 Tenn., 712, in these words: "The general creditors of a firm have no lien upon the partnership assets if the partners have none themselves. The claims of the firm creditors must be worked out through the equities of the partners. And a joint conveyance by partners of their partnership property in trust to secure their individual debts, operates to defeat their own

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lien and equity thereon, and *a fortiori* that of firm creditors, and gives priority of satisfaction out of the assets conveyed to the individual creditors. So partners may convey firm assets to one of their own number free from any lien for firm debts." *House v. Thompson*, 3 Head, 512. To the same effect is the ruling in *Case v. Beauregard*, 99 U. S., 119; *Ex Parte Ruffin*, 6 Vesey, 119-126; *Fitzpatrick v. Flanagan*, 106 U. S., 648; *Hulscamp v. Moline Plow Co.*, 121 U. S., 310. And the mere insolvency of the firm does not change the rule. *Fitzpatrick v. Flanagan*, 106 U. S., 648. To the same effect see *Wiggins v. Blackshear*, 86 Texas, 670; *Reynolds v. Johnson*, 54 Ark., 452; *Victor v. Glover*, 17 Wash., 37; *Bank v. Klien*, 64 Miss., 151 (S. C., 60 Am. Rep., 47); *Goddard v. McCune*, 122 Mo., 426; *Ellison v. Lucas*, 87 Ga., 227 (S. C., 27 Am. St. Rep., 242); *Harris v. Meyer*, 84 Wis., 147; *Purple v. Farrington*, 119 Ind., 164.

This we conceive to be a rule supported by an overwhelming weight of authority. But in all these cases and others holding the same doctrine stress is laid upon the fact that the transfer by the partners to third persons is made in good faith and for no fraudulent purpose of defeating firm creditors in collection of their debts, and the mere preference of an individual debt over partnership debts is not in itself and alone fraudulent. But where there is a fraudulent design, whether expressed or necessarily implied from a division of partnership property be-

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tween the partners, to defeat the creditors of the firm, the Courts will treat the fraud as vitiating the division or transfer and the assets as still belonging to the firm and subject to its debts. This is illustrated by the case of *Gill v. Lattimore*, 9 Lea, 381, where two partners divided certain horses and wagons between themselves and then claimed them as individual property and exempt from execution. The Court held that this could not be done and the horses and wagons were still firm property and subject to partnership debts. It would be difficult to distinguish that case in principle from the one now at bar, if the note had been seized in the hands of the partner, T. T. McDonald, and counsel for defendant concedes that in that case the seizure would have been good and the debt could have been subjected, but it is insisted that T. M. McDonald, the transferee of the note, is entitled to hold it and its proceeds as a *bona fide* assignee of T. T. McDonald. It appears that T. M. McDonald, when he received this note, knew that the firm had dissolved; that it was insolvent, and that he took it for an antecedent debt. He cannot, therefore, claim to be an innocent purchaser without notice, even though his debt is *bona fide*. *Allen v. The Bank*, 6 Lea, 558.

It is insisted that complainant, by his conduct at the trial before the Justice of the Peace, has estopped himself from claiming the note or judgment rendered on it as partnership assets, since he made no

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such claim at the trial, but, by simply insisting on certain credits for W. H. Bedford, impliedly recognized the right of defendant to recover the balance, after giving these credits, and then permitted execution to be stayed, and waited until the expiration of the stay before he made any claim. The argument is that T. M. McDonald, by his conduct, was encouraged to incur the trouble and expense of the suit, and perhaps to concede other claims which he held against W. H. Bedford in order to obtain the judgment, and the cases of *Barham v. Turberville*, 1 Swan, 439; *Fields v. Carney*, 4 Baxter, 137; *Galbraith v. Lunsford*, 87 Tenn., 104, are relied on as sustaining this view.

We cannot see any tangible ground for estoppel in the case. T. M. McDonald was claiming the note, and had sued upon it, as well as other claims he held against W. H. Bedford. All that complainant did was to insist upon certain set offs or credits for his nephew. It is not shown these were granted in order to quiet title to the balance of the note, or that anything was said on the trial as to the true ownership of the note. No costs or expense was incurred on account of anything done or said by complainant, and the most that can be said is that he waited on his rights until T. M. McDonald had obtained the judgment and had it secured by a stayor. We cannot see any want of good faith in this nor any ground for estoppel.

It is said that an offer was made to pay com-

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plainant out of this debt—that is, to credit the note if he would take his claim against W. H. Bedford. This he was unwilling to do, as W. H. Bedford was his kinsman and was insolvent, and we can see no obligation he was under to do so, nor can we see why, after the debt was secured by a stayor, he might not have been willing to look to it when he was unwilling before that. It is said the sale should be set aside because defendant was prevented from bidding at the sale. The injunction did not go to this extent, but only to the extent of prohibiting him from receiving any of the proceeds of sale. The effect of this was that he could still bid as any third person might, but instead of crediting his judgment or applying it in payment, he would have been required to pay the amount bid into Court and await further orders before any credit could be given. It is also insisted that the second sale was made after the crowd had dispersed and there were no bidders, and this was prejudicial to the sale. It is said, also, that whatever may be complainants' rights as against T. M. McDonald, they cannot be enforced as against Mrs. Virginia Bedford, the stayor, and it is insisted her obligation to pay is an independent one to T. M. McDonald, and not to the firm. This position is, we think, untenable, as the stay is a mere incident of the judgment and security for it and occupies, so far as this question is concerned, no independent status.

It is said the sale is void for want of certainty

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in the description of the land in the levy. It will be noted that this levy was made or caused to be made by defendant himself and that he was willing to purchase under it, and one of his complaints now is that he was not allowed to do so. It will be noted, also, that Mrs. Virginia Bedford takes no exception to the levy, but insists that it and the sale thereunder remain undisturbed, and she only insists upon her right to redeem and that such right be preserved.

We are of opinion that the sale was made for an insufficient price; that it was made under such circumstances as virtually prevented defendant from bidding for it; that, owing to these and other complications set up in the cross bill, the sale was not fairly made and should be set aside and the land resold after the title and description are perfected, but such sale will be subject to redemption for cash, and the decree of the Chancellor dismissing the cross bill is reversed and the cause will be remanded to be proceeded with according to this opinion and the prayer of the cross bill. The proceeds of sale will be treated as partnership assets for the benefit of partnership creditors. The cost of this Court will be divided between complainant and defendants and the cost of the Court below will be paid as the Chancellor may hereafter direct.

Polk v. Williams.

POLK v. WILLIAMS.

(*Jackson*. April 29, 1899.)

ESTOPPEL. *Exists, when.*

A person, who, by accepting an order of indefinite amount and giving assurance that at least \$100 would be realized thereon, induced the payee to dismiss his suit against the maker, is estopped to deny liability to the payee for at least one hundred dollars.

Cases cited and approved: Merriwether v. Larmon, 3 Sneed, 447; Spears v. Walker, 1 Head, 166; Phillips v. Hollister, 2 Cold., 277; Bankhead v. Alloway, 6 Cold., 75; Ruffin v. Johnson, 5 Heis., 609.

FROM SHELBY.

Appeal from the Chancery Court of Shelby County.
LEE THORNTON, Ch.

PIERSON & EWING and R. P. CARY for Polk,
Spinning & Co.

W. B. GLISSON for Williams.

WILKES, J. The suit in this case is brought on the following order and acceptance:

“MEMPHIS, TENN., Aug. 13, 1897.

“For value received I have this day bargained and sold and transferred to Polk, Spinning & Co.

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any and whatever interest I now have in and to the profits of the business of Evander Williams & Co., and this transfer is intended by me to operate as an order on said Evander Williams & Co. for whatever may be due from them or which may hereafter become due me by or through them. This does not include indebtedness due arising from cotton or cotton sales.

“Witness my hand, etc.

“(Signed) B. G. West.

“We accept the above order and agree to pay Polk, Spinning & Co. whatever is now due or may hereafter become due by or through us to the said B. G. West. (Signed) EVANDER WILLIAMS.”

The order arose out of this state of facts: West was owing Polk, Spinning & Co. \$260 and was insolvent. Williams and West had been partners in selling farm implements on a credit and on which they were to receive a commission or profits. These profits were to be divided, two-thirds to Williams and one-third to West. This arrangement continued until about August 1, 1897, when West withdrew. About this time an interview was had between Polk and Williams, in which Williams made a statement about his accounts with West.

Williams' version is that he told Polk, on Polk's inquiry, that West had quit him, and he thought he would owe him something, perhaps \$50 or \$100, but he could not tell what until the business was

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settled, and it depended on that settlement whether he would owe him anything; that the sales had been made on a credit, with liberty to return the implements or exchange them.

Polk, Spinning & Co. brought suit before a Justice of the Peace, whereupon West gave the order referred to and Williams gave the acceptance, and the suit was thereupon dismissed at complainants' cost. Williams' version is that several applications were made to him to know what amount would be due West, but that he replied he could not tell until the books were closed up, and he told complainants finally, but before they brought this suit, that there was nothing due West, and proposed to exhibit the books, and was greatly surprised when the suit was brought, and that, as a fact, nothing was due West, nor would be on settlement.

The version given by complainants puts quite a different aspect to the case. Their insistence is that Williams, having fallen out with West, came to Polk and said, in substance, that he had at that time \$100, or \$110, due West in his hands, and would have on final settlement enough to pay their entire demand of \$260. The decided weight of the testimony is in favor of complainants' version of the matter, and this is strengthened by the terms of the order and acceptance, and which, we think, clearly implies that there was an amount owing when the order was given and accepted, and that more would be owing when the final settlement was made.

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The Chancellor gave judgment for \$109.20 and cost, and both sides appealed and assigned errors, the defendant because any judgment was rendered, and the complainant because judgment was not rendered for the full amount of \$260. We are satisfied with the result reached by the Chancellor. We think the proof fails to show what amount would be due on final settlement, and it appears no final settlement had been made when the bill was filed, but the proof is very clear and convincing that the defendant, Williams, stated before and when the order was drawn and accepted, that he had \$100 in his hands at that time to which West was entitled, and upon the faith of this statement Polk, Spinning & Co. brought suit before a Justice of the Peace with a view of garnisheeing the defendant, and afterwards, upon the faith of this order and acceptance, and the assurance of defendant that he had this sum then in hand, dismissed the suit, paid the costs, and took the accepted order.

The rule laid down in *Coolidge v. Payson et al.*, 2 Wheaton, 62, is applicable, that a promise to accept a bill amounts to an acceptance to a person who has taken it on the faith of that promise, although the promise was made before the existence of the bill, and although it is taken by a person for a pre-existing debt.

Defendant is estopped to deny the statement that he had in his hands \$100, a statement which led the complainant to bring the suit before the Justice

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of the Peace and afterwards to accept the order and dismiss the suit. *Merriwether v. Larmon*, 3 Sneed, 447, 452; *Spears v. Walker*, 1 Head, 166; *Phillips v. Hollister*, 2 Cold., 277; *Bankhead v. Alloway*, 6 Cold., 75; *Ruffin v. Johnson*, 5 Heis., 609.

The judgment of the Court below is affirmed, and the cost of this Court will be divided equally. The costs of the Court below will remain as adjudged by that Court.

Slack v. Suddoth.

SLACK v. SUDDOTH.

(Jackson. April 29, 1899.)

GOOD WILL. *Not subject of forced sale or transfer, when.*

No forced sale or transfer can be made of a good will, such as that of a partnership of dentists, in a suit to wind up the partnership, when it is based upon professional reputation and standing or upon business connections, although it might be the subject of a voluntary sale.

Case cited: Bank v. Bank, 7 Lea, 420.

FROM SHELBY.

Appeal from the Chancery Court of Shelby County.
STERLING PIERSON, Ch.

L. & E. LEHMAN for Slack.

SMITH & TREZEVANT, for Suddoth.

WILKES, J. Drs. Slack and Suddoth were partners in the practice of dentistry in the city of Memphis for a number of years. They occupied two offices on the second floor of No. 243 Main Street, which they rented or leased year by year. They were equally interested in the business and property of the firm and the partnership was un-

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limited as to duration. The subject of dissolution was discussed between them for several months, but no satisfactory conclusion was reached until, on April 30, 1894, complainant notified defendant that the partnership was dissolved. Before doing so, however, or on the day after, he rented another office in the same building and near the head of the stairway, and on the next day after the dissolution he advertised in the daily paper that the partnership was dissolved and he was located for practice in an adjoining room in the same building, and he put his sign up at his office door. Attempts were made between the parties to settle up their business, but they were unsuccessful. Suddoth remained in charge of the old offices and used such of the furniture and instruments as he needed or wished. Slack then filed a bill to wind up the partnership, and he asked that a receiver be appointed to take charge of the lease and property and sell the same, and that he be allowed to start the biddings for the same at \$2,000. The defendant answered. The Chancellor appointed a receiver, and directed him to offer the use and rent of the two rooms to both parties for the remainder of the year (about seven months) and to let them go to whichever would indemnify the other against the landlord's rent and give the greatest bonus in addition. He was also to take possession of the personal property and hold it for further orders. Defendant thereupon obtained from one of the Judges of this Court a fiat superseding

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the order of the Court below to sell the use of the offices. This was dissolved at the April term, 1895, of this Court and the cause remanded for further proceedings. In the meantime the current rent or lease expired, and defendant himself leased the rooms from the landlord and continued in possession. The Chancellor ordered a reference upon the several features necessary to settle accounts between the parties, and, among other things, the Master was directed to report what leases the partnership had when the suit began and which one of the parties had received the benefit of the same, and how much, if anything, he should pay therefor, and who had paid the landlord's rent, and what damage had accrued to complainant by reason of the supersedeas sued out in this Court. The Clerk reported the facts as already stated and that defendant should pay to the complainant \$500 for his interest in the lease, upon the ground that it was valuable, and enabled the holder to appear to the public as the successor of the old and well established firm and procure a re-lease of the property. This was excepted to and exception overruled by the Chancellor, and there was an allowance of \$500 in favor of complainant for his interest in the remainder of the rental or lease contract, reciting that it was the value of the "good will" attached to the offices. From this much of the decree the defendant appealed, and this presents the only question before us.

The rental paid the landlord for the rooms under

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the lease to the firm was \$49 per month, and after the firm dissolved defendant continued to pay this amount of rental, and after the expiration of that lease he rerented at the same rate. It appears that the complainant also tried to rerent the rooms at the same price after the firm lease terminated.

The Chancellor, as well as counsel, have treated the item of \$500 as the "good will" of the firm. It is difficult to define what "good will" is. Lord Eldon said that it was simply "the possibility that the old customers will resort to the old place." *Crutwell v. Lye*, 17 Vesey, 335; *Moreau v. Edwards*, 2 Tenn. Ch., 349. But in *Christian v. Douglass*, Johns. Eng. Ch., 174, it was said that this was too narrow a view to take of it, and there it was said that it was every positive advantage acquired, arising out of the business of the old firm, whether connected with the premises where it was carried on, with the name of the late firm, or with any other matter carrying with it the benefit of the business of the old firm. But it is evident that this definition is too narrow when applied to the good will of a partnership to practice a profession, since it leaves out of view the advantage to be gained from the professional standing and reputation of the partners themselves, which constitutes the principal feature of value in such partnerships. Accordingly, it is insisted that there is no such thing as "good will" attaching to professional partnerships. Certainly there can be no forced sale or transfer *in in-*

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vitum of such good will so far as it is based upon professional reputation and standing, such as arises from the skill of physicians, dentists, attorneys, etc., whatever may be done as to such good will as arises out of location. Still, in the sense in which Lord Eldon uses the term good will of the premises, there may be an advantage of pecuniary value in occupying premises which have been occupied by skilled professional men, and to which the public has resorted or has been attracted by advertisements, or prior visits or general reputation of prior occupants. Many persons attracted to the place by the reputation of former occupants might remain no matter who might be in occupancy, and others might leave so soon as it was ascertained they were not occupied by the persons in whom they have professional and personal confidence.

It will be seen from this brief mention what an unreliable, and we might say imaginary, value could be placed upon what is called "good will" in this case. *Bank v. Bank*, 7 Lea, 420. Certain it is that there was no actual good will between these parties after the dissolution. On the contrary, they were hostile in their views.

It was not the case of one professional retiring and recommending his successor to his old customers, which is the principal feature in the sales of good will when voluntarily made. But in this instance the defendant was not recommended by complainant. On the contrary, he entered immediately

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into open and aggressive competition with him. Neither could defendant hope to reap much, if any, advantage from occupying the same quarters, for the complainant, as an active competitor, was hard by in the next room, and as likely to get the old customers, perhaps, as was the defendant. The Clerk and Master and Chancellor evidently fixed the value of this good will, as it is termed, from the circumstance that complainant had expressed a willingness to pay defendant \$500 for the use of the offices for the remaining term of seven months unexpired. But it must be evident on the one hand that he might be willing, after having secured his own office adjoining, to pay this sum to have the old offices closed and defendant removed entirely from the premises, and never use the rooms himself, and, on the other hand, defendant did not stand upon an equal footing in bidding for the use of the offices, because if he failed to get them he must go off into some other locality, while, if complainant failed to get them, he had only to step into the next room, and, according to the proof, be as favorably located, if not more so, than in the old offices. The complainant could thus set himself up in the premises of the old firm, and, inasmuch as the defendant had gone out of the building, he might be taken as the successor of the old firm. But defendant could not do this, because complainant was located at his very threshold, to rebut such an inference by the public. We do not think this

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offer was any criterion of value of the use of these rooms. It might more properly be said to be complainant's estimate of benefit to be used for closing them up. But we think the principle back of all is that no forced sale or transfer can be made of a good will when it is based upon professional reputation and standing or upon business connections. "Good will" implies something gained by consent, not something realized by force or coercion. We do not mean to hold that "good will" has no value and may not be the subject of a voluntary sale. On the contrary, we think it might be sold and is a valid consideration for a contract, and it has been so held in a number of cases. 8 Am. & Eng. Enc. L., 1372, note 7.

In *Burns v. Guy*, 4 East, 190, a contract by a practicing attorney to relinquish his business and recommend his clients to two other attorneys, and that he would not re-enter the practice in certain localities, was held a good contract. So in *Whittaker v. Howe*, 3 Beavan, 383. In *Hoyt v. Holly*, 39 Conn., 326, there was a similar contract made by a physician with a brother physician, and it was sustained. So in the case of *Warfield v. Booth*, 33 Md., 63. In all these cases there was a voluntary sale and an obligation to aid the purchaser or not to enter into competition with him for a certain time or in certain localities. No doubt in this case complainant could have made a valid agreement with defendant for a consideration to leave the old offices

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and let him have the advantage of their use, but this was not done.

We are of opinion it was error to allow this item, and it is stricken out. Judgment will be rendered as may be indicated by the result. This may be agreed on, or the Clerk of this Court, in the absence of such agreement, will report the amount. The appellee will pay costs of appeal. Costs of Court below will remain as adjudged by that Court.

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FITZGERALD v. STANDISH.

(Jackson. April 29, 1899.)

1. WILLS. *Surviving executrix may execute power of sale.*

Under a will devising the widow a life estate and authorizing her and her co-executor, as such, to sell lands, "if, in their judgment, they think it best," the widow may, as surviving executrix, in pursuance of such power, sell the lands to pay debts of the estate and make a valid, fee simple title. (*Post*, pp. 384-393.)

2. SAME. *Survival of powers.*

The general rule is, that powers coupled with a trust, or coupled with an interest in the estate, survive, but mere naked powers do not survive. (*Post*, pp. 388-390.)

Cases cited and approved: *Robinson v. Gaines*, 2 Hum., 367; *Williams v. Otey*, 8 Hum., 563.

3. SAME. *Discretionary powers.*

The rule and policy that forbid delegation or survival of discretionary powers, the execution of which rests upon personal trust and confidence, do not apply to discretionary powers conferred upon executors in their representative capacity. (*Post*, pp. 391, 392.)

Cases cited and approved: *Deadrick v. Cantrell*, 10 Yer., 263; *Armstrong v. Park*, 9 Hum., 195; *Belote v. White*, 2 Head, 703; *Murdock v. Leath*, 10 Heis., 176.

4. INNOCENT PURCHASER. *Rightful execution of powers presumed in favor of.*

Where it is doubtful whether a power has been exercised legally or illegally, in favor of innocent purchasers and meritorious

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claimants, the legal execution will be presumed. (*Post*, p. 393.)

Cases cited and approved: *Marshall v. Stephens*, 8 Hum., 159; *Wilburn v. Spofford*, 4 Sneed, 699.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
STERLING PIERSON, Ch.

A. S. BUCHANAN for Fitzgerald.

JOHN C. MYERS and F. P. POSTON for Standish.

WILKES, J. The question involved in this case is the power and authority of a survivor of two executors to sell land belonging to the testator under a discretionary power vested by the will in the executors. It arises under the will and codicil thereto of Rev. James Dennis, of DeSoto County, Mississippi, which are in the following words and figures:

“I, James Dennis, of the County of DeSoto, and State of Mississippi, being of sound and disposing mind and memory, make this, my last will and testament, hereby revoking all other wills made by me, to wit:

“1. It is my will that all of my just debts be

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paid, and funeral expenses, and after they are all paid:

“2. I give, devise, and bequeath all of my estate, real and personal, to my beloved wife, Caroline Dennis, during her natural life.

“3. After her death, I give to the Baptist College, at Clinton, Mississippi, one thousand dollars, the interest of which is to be used to educate poor young men of the Baptist Church who feel it their duty to preach the gospel and have not the means to get an education.

“4. And the remainder, if any, to be equally divided between my nephews, S. B. Dennis and J. B. Dennis, and my niece, Mattie Dennis.

“5. I appoint my wife, Caroline Dennis, and my friend, S. C. Williams, executrix and executor of this, my last will and testament. It is my will that my executrix and executor give no bond.

“Witness my hand and seal this sixteenth of October, 1878.

JAMES DENNIS. (Seal.)

“J. L. DOLEHITE,

“G. T. BANKS,

“T. L. CLIFTON.

“CODICIL.

“STATE OF MISSISSIPPI,

“DESOTO COUNTY, January 13, 1881.

“I, James Dennis, do make this my codicil, hereby confirming my last will, made on the sixteenth of October, 1878, and do hereby authorize my executor

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and executrix to sell my land, all or any part thereof, if in their judgment they think it best.

“In testimony whereof I have hereunto set my hand and seal this day and date above written.

“J. L. DOLEHITE, JAMES DENNIS. (Seal.)

“T. L. CLIFTON,

“G. T. BANKS.

“Filed March 5, 1883. R. R. WEST, *Clerk.*”

Both the executor and executrix were duly appointed, and qualified as such in 1885. Two years after the death of the testator, and after he had qualified as executor, S. C. Williams died, and no other executor was appointed or qualified in his stead. About seven months after the death of S. C. Williams, Mrs. Caroline Dennis, executrix, executed a deed to a lot in Memphis to one Scott Wilson (one of the defendants herein) for \$100 cash, he to assume payment of the taxes then due on the said lot, the deed reciting that there is a large amount of back taxes and the taxes of the current year. And in about two years afterward Wilson sold and conveyed this lot to his co-defendant, Mrs. Standish, for \$1,750.

The complainants' contentions are: (1) That Mrs. Caroline Dennis only intended to sell and convey her life estate; (2) that neither the executor nor executrix could, alone, convey the fee title to any part of the land belonging to the estate, but that,

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by the terms of the will, it required the concurrence of both.

The bill was filed by the remaindermen under the will, and it was sought to have the conveyance made by Mrs. Caroline Dennis, executrix, declared inoperative and void except so far as it might serve to convey her life estate in the lot. The cause was heard upon demurrer, which presented to the Court the insistence that the deed was a valid execution of the power given under the will to sell the lot, and that it conveyed a fee simple title thereto to Scott Wilson. This demurrer was sustained and the bill dismissed, and complainants appealed and have assigned errors.

The only question presented in this Court is whether the power to sell the real estate of James Dennis, conferred by this will, survived S. C. Williams, one of his executors, who died without executing the power, and could be exercised by the surviving executrix, Mrs. Caroline Dennis, so as to vest a fee simple title in the purchaser. It is a pure legal question. No bad faith is attributed to the executrix. It appears she received from the sale of the lot \$100 cash, and the assumption of current taxes and a large amount of delinquent taxes, but what the full consideration was does not appear. It also appears that when Wilson, two years afterward, sold, he received \$1,750 for the lot, but it does not appear that it was not improved in the meanwhile. At any rate, no question is made

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but the one of legal authority to sell and the effect of the conveyance as made in good faith. It is said there is an intention, clearly and unmistakably inferable from the will, that the testator did not intend a sale of the real estate to be made except it was concurred in both by his executor, Williams, and his widow, Caroline. As evidences of this intention, our attention is called to the fact that the testator had such implicit confidence in his executor, Williams, that he released him, as well as his wife, from giving any bond; that in the codicil he vested in the executor and executrix power to sell if, in their judgment, they might think best, and the use of these terms, executor and executrix, was a designation as pointed as if he had called the names. It is also said that he does not vest title in his executor, nor does he authoritatively require a sale, but merely confers a power contingent upon their discretion and joint judgment. It is also suggested that the testator must have relied most upon the judgment of his friend, and not upon that of his wife, or he would not have named him as co-executor.

Unquestionably where a mere power is vested in two or more persons, they must join in its execution in order that it be valid, and the general rule is that mere powers do not survive unless so expressed. 18 Am. & Eng. Enc. L. (1st Ed.), 160; *Peter v. Beverly*, 10 Pet., 532; *Asgood v. Franklin*, 7 Am. Dec., 573; *Burger v. Bennett*, 2 Am. Dec., 281.

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“A mere direction to executors to sell, there being no devise of an interest and no trust created, is a naked power, and does not survive. But, if anything is directed to be done in which other persons are interested, or if others have the right to call on the executor to execute the power, such power survives, even though it is not strictly a power coupled with an interest.” 18 Am. & Eng. Enc. L. (1st Ed.), 961. Powers coupled with a trust do survive, and will be enforced in equity. *Ib.*, note 1. The same doctrine is held in our own cases of *Robinson v. Gaines*, 2 Hum., 367, and *Williams v. Otey*, 8 Hum., 563. The result of the cases is that a power coupled with an interest in the estate, or with a trust in reference to it, will survive, while a mere naked power will not. Vol. 1, pp. 205, 206.

Mr. Sugden lays down the general rules governing the survivorship of powers as follows:

“1. Where a power is given to two or more by their proper names, not made executors, it does not survive without express words.

“2. Where a power is given to three or more as a class, such as ‘my trustees,’ ‘my sons,’ and not by their proper names, the authority survives so long as more than one remains.

“3. Where the power is given to executors, and the will does not expressly require a joint exercise of it, even a surviving executor may execute it; but, if given to them *nominatim*, though in the

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character of executors, it is doubtful whether it shall survive.”

In 2 Perry on Trusts, Sec. 499, it is said: “In the United States a power given to executors, or trustees as such, to sell real estate, may be exercised so long as a single donee survives.” To the same effect, see 4 Greenleaf’s Cruise’s Dig., 199, note 1; 18 Am. & Eng. Enc. L., 963, note 3.

In *Zeback v. Smith*, 3 Burnley (Pa.), 69 (S. C., 5 Am. Dec., 352), three executors were given power to sell land, naming them. Two of the executors declined to act, and it was held that, though these were given power *nominatim*, still the authority was given them in their character of executors, and it was held that the one who qualified was empowered to sell.

In the case of *Jackson v. Ferris*, 15 Johns., 346, the testator directed a sale of his real estate if there was a deficiency of personal assets, and then devised his real and personal estate to his wife for life, and appointed her and another his executors. The widow alone undertook to execute the will, and there being no personal estate, she sold and conveyed part of the land. The Court held that it was a power coupled both with a trust and an interest, and was well executed by the wife alone. It will be observed, however, that there was a necessity, in this case, to sell land to pay debts.

In *Heim v. Forth*, 43 N. J. L., 1, the will directed payment of debts, then gave the wife a life

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estate, with remainder to third persons, and named the wife and a friend as executor and executrix, with power of sale in language much the same as in this case. In that case, as in the one at bar, the will directed, first, the payment of debts, second, created a life estate in the wife and a remainder to third persons, naming his wife and friend as executor and executrix. One of the executors died or was removed, and the survivor attempted to exercise the power, which was resisted. It was held that the power was validly executed, and that the life estate was such an interest as, coupled with the power to sell, had the effect to make the power of sale effective in the surviving executor. Now, in the case at bar, there was no interest vested in Williams, but only a trust to pay debts, and to pay \$1,000 to the Baptist College, and to see that the life tenant and remaindermen took under the provisions of the will, and the latter may be classed as passive and not active trusts. As to Mrs. Dennis, there was a life interest, and, in addition, a trust to pay debts. The trust as to the college and as to the remaindermen she could not join in executing, as it was to be executed only after her death, and as to these Williams alone could have the power to sell after her death, and there could be no joint exercise of both power and judgment.

It is strongly urged that the power given in this case, whether coupled with an interest or trust, or not, is, nevertheless, a discretionary power vested in

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both. As to discretionary powers the execution of which rests upon personal trust and confidence, the rule is that the power can only be executed by the trustee, or trustees, appointed by the donor, and cannot be delegated, nor does it survive. *Deaderick v. Cantrell*, 10 Yerg., 263; *Armstrong v. Park*, 9 Hum., 195; *Belote v. White*, 2 Head, 703; *Murdock v. Leath*, 10 Heis., 176.

It is agreed, however, that the discretion in this case is not rested upon personal trust and confidence in Williams and Mrs. Dennis, but at most can only vest in them in their representative character as executors, and in that capacity their right to sell is absolute.

It must be noted, however, that the power to sell in this case is not mandatory. There is only one contingency in which it could be necessary for the widow to sell, and that is for the payment of debts. She could not sell for the benefit of the college nor for the remaindermen, for they were to take nothing until after her death. We are, of course, not now considering the authority of Williams if he had been the survivor. It is true, a sale might be a matter of convenience and policy for the better enjoyment of the widow's life estate, but this would not be a matter of necessity, but convenience only. But in this case it appears that she sold, at least to a great extent, to pay debts. The consideration for the deed is \$100 cash, and

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the current taxes and a large amount of back taxes. The amount of taxes does not appear, but the language of the deed is that it was a large amount, and the term "large amount" was evidently used in contrast to the small amount of cash received. When these taxes accrued does not appear, but the testator died in 1883, and the deed was made in 1885, so that we may and must infer that they had accumulated in the lifetime of the testator to a large extent, and were, therefore, debts against his estate. We think we are authorized, therefore, to infer that the surviving executrix sold this lot in order to pay the large amount of taxes upon it, and the cash of \$100 was a mere incident and minor part of the consideration. The purchaser of the lot in this case, as well as the present owner, appear to be innocent purchasers and to have bought in good faith, and in their interest the rule will be enforced that where it is doubtful whether a power has been exercised legally or illegally, in favor of innocent purchasers and meritorious claimants, the legal execution will be presumed. *Marshall v. Stephens*, 8 Hum., 159; *Wilburn v. Spofford*, 4 Sneed, 699.

We are of opinion, therefore, that the widow, as surviving executrix, had the power to make the sale, and made it for purposes contemplated by the will, and could and did convey a fee simple title and not merely her life estate, and that she con-

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veyed as executrix under the power, and not as widow and owner of a life estate simply. The decree of the Court sustaining the demurrer is, therefore, sustained and the bill dismissed at cost of complainant.

Shelby County v. Bickford.

SHELBY COUNTY v. BICKFORD.

(Jackson. April 29, 1899.)

1. CHANCERY PRACTICE. *Applicable to case transferred from Law Court.*

The proceedings subsequent to the transfer of a case from the Circuit Court to the Chancery Court, pursuant to Shannon's Code, § 6074, are according to the forms and rules of chancery pleading and practice, and upon appeal the hearing will be *de novo* upon the record as its component parts may appear, and there is no presumption, as in cases at law in the absence of a bill of exceptions, that the proof below was sufficient to sustain the finding of the Court. (*Post*, pp. 397-402.)

Code construed: § 6074 (S.); § 5008 (M. & V.); § 4236 (T. & S.).

2. MAXIM.

Nullum tempus occurrit regi. (*Post*, p. 402.)

3. LIMITATIONS, STATUTE OF. *Runs against county when.*

An action by a county to recover an indebtedness which it claims by virtue of a contractual relation between itself and defendants, is subject to the statute of limitations the same as an action by an individual. (*Post*, p. 402.)

Cases cited and approved: *State v. Ward*, 9 Heis., 111; *Moore v. Tate*, 87 Tenn., 729.

4. SUPREME COURT. *Will not reverse for variance between decree and summons.*

The objection that the damages allowed by the decree exceed the amount laid in the summons cannot be raised for the first time on appeal, where damages laid in the declaration are not less than those allowed by the decree, as the statute of jeofails is in force in this State. (*Post*, pp. 403, 404.)

Code construed: §§ 4553-4560 (S.); §§ —, — (M. & V.); §§ —, — (T. & S.).

Cases cited and approved: *Johnson v. Bank*, 1 Hum., 77; *Martin*

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v. Bank, 2 Cold., 332; McBee v. Petty, 3 Cold., 178; Eakin v. Burger, 1 Sneed, 424; Lyon v. Brown, 6 Bax., 64.

5. SAME. *Deeds and records not considered part of record, when.*

Deeds and records of other causes used as evidence on the hearing of a chancery cause cannot be considered by this Court, though copied into the transcript, in the absence of bill of exceptions, decree, or other sufficient action to indicate that they were so used in the lower Court. (*Post*, pp. 404-406.)

Code construed; § 4836 (S.); § 3821 (M. & V.); § 3108 (T. & S.).

Cases cited and approved: Allan v. State, M. & Y., 295; Bush v. Phillips, 3 Lea, 63; Railway Co. v. Foster, 88 Tenn., 671; Marble Co. v. Black, 89 Tenn., 121.

6. SAME. *Cannot amend record.*

This Court cannot incorporate into the record sent up evidence not made part of it, though it is made to appear by affidavits that such evidence was used on the hearing in the lower Court. (*Post*, pp. 406, 407.)

Case cited: Kennedy v. Kennedy, 16 Lea, 736.

7. PLEADING AND PRACTICE. *Several and inconsistent pleas allowed.*

Under our practice, the defendant may plead and rely upon several and inconsistent pleas, and hence the admission of the covenants sued on, implied from the plea of covenants performed does not deprive defendant of the benefit of other distinct pleas denying execution of the deed and covenants. (*Post*, pp. 407, 408.)

Code construed: § 4628 (S.); § 3617 (M. & V.); § 2907 (T. & S.).

Cases cited: Steele v. McKinnie, 5 Yer., 549; Governor v. Organ, 5 Hum., 161; Langford v. Frey, 8 Hum., 443; Kelly v. Craig, 9 Hum., 215.

 FROM SHELBY.

Appeal from the Chancery Court of Shelby County.
STERLING PIERSON, Ch.

Shelby County v. Bickford.

R. D. JORDAN, GEO. B. PETERS, and GILMER P. SMITH for Shelby County.

JAS. H. MALONE and J. M. GREGORY for Bickford.

McFARLAND, Sp. J. This suit was brought on January 8, 1889, by the county of Shelby against W. A. Bickford and Amos Woodruff, in Circuit Court. The damages laid in summons were \$10,000. The declaration contained three counts, two of which, in substance, alleged that Bickford and Woodruff, being seized of certain lots in Memphis, Tenn., known as the Overton Hotel property, on April 23, 1874, sold these lots to the county of Shelby for \$150,000, a part of which was paid in cash, and notes given for deferred payments; that a deed was executed in which the defendants covenanted that they were seized in fee, had a good right to convey, that the land was free from incumbrances, and that they would defend title to same. The declaration says as to this deed: "And by this deed here to the Court shown, in consideration of \$150,000, . . . did bargain and sell," etc. This deed does not appear to have been filed with the declaration or appear in the record as originally filed in this Court. The declaration averred a breach of the covenants especially against incumbrances, alleging that Bickford and Woodruff were the owners of the property in 1870 and 1871, and that there was due the State

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and county for taxes, which were a lien on this property, for the years mentioned, to the State \$2,732.38; county, \$7,243.05; total, \$10,475.43, and that this first sum of \$2,732.38 due the State the plaintiff had to pay the State under decree of sale made in the cause of *Anderson v. Partee et al.*, in Chancery Court of Shelby County, Tennessee.

The first count concludes in these words: "And the plaintiff avers that it has often demanded of the defendant the payment of said sum of \$2,732.38 paid to the State of Tennessee, and the sum of \$7,743.05 due to it for the assessed value for said property for the years 1870 and 1871, but, notwithstanding this, said defendants have wholly and entirely failed and refused to pay either or any part of said sums of money or interest, to the plaintiff's damage, wherefore it sues."

The second count recites the deed, covenants, etc., and avers that the lots were liable for taxes to the State and county for 1870 and 1871, for \$10,106.13, and that the defendants were bound by their covenants to pay the same; that when final payment of the balance due on the purchase was made in the sum of \$14,035, on February 2, 1885, the defendants declared that all taxes due and a lien on said property had been paid, and that it was free from taxes, notwithstanding which the defendant suffered said land to be sold for taxes due to the State for the years 1870 and 1871,

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For the sum of	\$ 2,363 08
Together with the cost of the cause.....	369 30
	<hr/>
Making a total of	\$ 2,732 38
Which, added to amount due county.....	7,743 05
	<hr/>
Made a grand total of	\$10,475 43

The main feature of this count is to have a recovery upon the verbal promise and undertaking of the defendants, thus set forth: "And the plaintiff avers, at the time of the payment of the several sums of money due the said defendants for the purchase of said property by the plaintiff, and especially on the occasion of part payment, to wit, the second day of February, 1885, the said defendants represented that each and all of the taxes on said property due the State and county, including all years, have been paid, and if there were any still due prior to the year 1875, the same should and would be paid at once, and they positively alleged, plaintiff avers, that all of said taxes were then paid and discharged. But, notwithstanding this, the said taxes due for the years 1870 and 1871 were forced out of plaintiff in order to redeem their said property, and the county taxes for the years 1870 and 1871 still remain unpaid to plaintiff, though often requested," etc.

The third count in the declaration is for money loaned, work and labor done, and money paid for them, all on February 2, 1889, etc., without stating any amount claimed.

Bickford filed twenty different pleas, in which he denied every material averment of the declaration, and

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plead covenants performed, limitation, payment, stated account, settlement, merger, general issue, etc.

The case was, by order of the Circuit Court and the consent of the parties, transferred for trial to the Chancery Court November 28, 1890. Woodruff made no defense, and a *pro confesso* was taken as to him, and no further notice seems to have been taken so far as he was concerned, his name not being mentioned in the final decree. W. A. Bickford having died, a motion was made on, to wit, November 25, 1895, by counsel for the defense, to abate the cause, for the reason that four whole terms of the Court had elapsed since the death of Bickford had been suggested and proven, and as it appeared to the Court that *scire facias* had been issued and served on the executrix of Bickford, requiring her to show cause why the suit should not be revived against her, the motion to abate was overruled and the cause was revived.

On October 8, 1895, a stipulation of counsel was filed in the cause by which they agreed to use the original papers in the chancery case of *Anderson v. Partee* as evidence in the cause, subject to all exceptions for irrelevancy and incompetency. This record in the case of *Anderson v. Partee*, No. —, Chancery Court of Shelby County, appears in the transcript, but how it got there does not appear except upon affidavits of complainant's attorney, filed upon suggestion of diminution. There was a

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decree in the Chancery Court against W. A. Bickford's estate for \$13,984.63, appeal and assignment of errors by Bickford's executrix.

It is necessary, before noticing the several assignments of error, and in order to correctly determine this case, that we should fix and define the status of this case, and of the complainants in the case.

The case was begun by summons in the Circuit Court, and declaration filed there. It was then removed to the Chancery Court, and further proceedings had there. The results may be very different if the case was continued in the Chancery Court as a law case and heard as such. If still a law case, inasmuch as there was no bill of exceptions filed, the presumption here will be, whatever may be wanting of proof in the record, that there was proof below sufficient to sustain the finding of the Court below. If proceeded with after removal and heard as a chancery cause there, upon appeal here the hearing will be *de novo* and upon the record as its component parts may appear.

The order transferring is as follows: "On application of plaintiff to transfer this cause to the Chancery Court of Shelby County, and it appearing to the Court that it is a cause of an equitable nature, and, by consent of parties, it is by the Court ordered that this cause be, and is hereby, transferred for further proceedings and trial to the Chancery Court of Shelby County," etc. This order was made under the provisions of § 6074, Shannon's

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Code, which provides for such removal, and clearly contemplates that proceedings subsequent to removal shall be according to the forms and rules of chancery pleading and practice.

The next question is as to the status of the plaintiffs with respect to this suit. If this is an action by the State in its sovereign capacity, or by the county as one of the agents of the sovereign, and for the recovery of taxes, then the ordinary statutes of limitation will not apply, under the maxim, "*Nullum tempus occurrit regi*," unless the Acts 1885, Ch. 24 and Ch. 86, apply.

This action is not by the county to recover taxes—quasi taxes—but to recover an indebtedness, which it claims by virtue of a contractual relation between it and defendant. It is not brought by the county in its delegated sovereign capacity for the recovery of any revenue due it by imposition of its sovereign will, but as an individual sues another individual for any ordinary breach of contract. It is well settled that in such cases, where the government enters into trading relations or litigation, it divests itself of all sovereignty and loses its exemption. *The Siren*, 7 Wall., 154; *Bank U. S. v. P. Bank*, 9 Wheaton, 907; *Shomburg v. United States*, 103 U. S., 667; *Moore v. Tate*, 3 Pickle, 729; *State v. Ward*, 9 Heis., 111; *Angell Lim.*, Sec. 41; *Galloway v. Copart*, 45 Ark., 81.

The case, then, is to be tried as one between two

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individuals, governed by the rules of chancery pleading and practice.

Proceeding, then, to the examination of the question involved in this record, as raised by the several assignments of error, we find that the first assignment of error is that the decree was too large, being for \$13,984.63, while the damages laid in summons are only \$10,000. This objection was not made until in this Court. This is too late. The declaration in all the counts, except the third, claims \$15,000 damages. There was no plea in abatement, motion in arrest of judgment, or other objection below. The declaration increased the damages, issue was made upon it, trial and verdict. "By statute of jeofails," says Stephens, "an objection to variance between declaration and original summons cannot now be taken by writ of error after verdict." Stephens Plead., 427. It is settled in Tennessee that a variance in the writ and declaration is cured by plea in bar and trial on the merits. *Johnson v. Planters' Bank*, 1 Hum., 77.

In this case the Court held that the statute of jeofails is in force in Tennessee, and that the statute 5 George I. declares that no judgment shall be stayed or reversed for any defect or fault, either in form or substance, in any bill, writ, or for any variance in such writs from the declaration or other proceedings. The Court says: "Had the defendant in the Court below pleaded in abatement, they would have defeated the plaintiff's action, but they chose to

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plead to the declaration in bar and to have a trial on the merits. Having done so, and a verdict having been found against them, the situation of the parties is very much changed . . . We consider, therefore," says the Court, "that the statute of 5 George I. is in force, and that, after verdict, no judgment can be reversed for any variance in the writ from the declaration either in form or substance."

Now, under the various statutes as to amendments, carried into the Code §§ 4553 to 4560, this Court will permit amendments of the writ so as to conform to the declaration and judgment. *Martin v. Bank of Tennessee*, 2 Cold., 332. And this is usually done by merely considering it as done. *McBee v. Petty*, 3 Cold., 178; *Eaken v. Burger*, 1 Sneed, 424; *Lyon v. Brown*, 6 Bax., 64. This assignment of error is not well taken, and is overruled.

The second assignment is as follows: "The action is based on alleged covenants of a certain deed. Defendant Bickford, by plea, denied having made such a covenant. The deed was not offered in evidence, nor is there a line of evidence to show that Bickford entered into the covenants sued on, hence there is no evidence to support judgment or decree."

The sixth assignment raises the same question as to the record in the case of *Anderson v. Partee*. It follows the fifth assignment of error as to statute of limitations, and is as follows: "The action is not taken out of the operation of the statute by reason of the alleged chancery suit of *Anderson v.*

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Partee. The record in that case, though copied into the transcript, is no part of the record in the present case. It was not made a part of the record either by being filed in the cause, or by a bill of exceptions, or by recitation in the decree of the Court."

The eighth assignment is also to the effect that, for other reasons, this record is incompetent as evidence in this suit.

These three assignments of error raise substantially the same question.

As to the deed, which is the basis of complainant's action, it was not copied in the original transcript; it was not mentioned in the final or any other decree. The only reference to it in the record was, as has been shown in the declaration, where it is referred to as "here shown to the Court," and Woodruff, in his testimony, also referred to it in a general way and only incidentally. He does not pretend to set up such deed.

As to the record in the case of *Anderson v. Partee*, Chancery Court, which is copied in the transcript, the only reference to that in this case is an agreement of counsel, filed in this cause December 6, 1895, that the record in that cause "may be used herein as evidence on the hearing of this cause in lieu and instead of certified copies, . . . exceptions for incompetency and irrelevancy, as to all or any portions of said record, reserved." The decrees, interlocutory or final, do not mention this

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case. There was no bill of exceptions filed in the case. There is no evidence, therefore, in the record that either the deed upon which complainant based his recovery, or the record in *Anderson v. Partee*, upon which complainant sought to base an outstanding incumbrance, were ever used as evidence. Neither of these appear to be a part of the record. The agreement of the parties is only that the proceedings in *Anderson v. Partee* may be used—not that they were used. There is nothing showing they were used.

It is the province of a bill of exceptions to make the evidence used in the trial of a cause a part of the record where not made so by the statute. *Allen v. State*, M. & Y., 295; *Bush v. Phillips*, 3 Lea, 63.

Sections 4836 and 4839 make depositions filed and exhibits and bonds part of the record.

But without such bill of exceptions or some decree entered in the cause, making deeds or records of other causes parts of the record in the case appealed, they will not be considered. *Railway Co. v. Foster*, 4 Pickle, 671; *Marble Co. v. Black*, 5 Pickle, 121, and cases cited.

After the appeal was effected in this cause and transcript filed here, diminution of record was suggested here, and several affidavits filed seeking to show that the deed referred to and the record in the cause of *Anderson v. Partee* were both read on hearing below, and the deed was thereupon sent up and filed with the balance of the record. This,

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however, does not make these papers a part of the record. Even the trial Judge cannot, after appeal, amend and insert in the bill of exceptions omitted recitals, though parties agree to its being done. *Kinney v. Kinney*, 16 Lea, 736. The effort here is, by affidavits filed in this Court, to supply the bill of exception and incorporate into the record here evidence which was never made a part of the record in Court below. This practice is vicious in itself, contrary to established rules, and would lead to harmful results in the future.

It is insisted, however, that inasmuch as the defendant did not plead *non est factum*, demur, or crave oyer, and did plead covenants performed and went to trial on such issue, he waived the objection this assignment of error raises. It is true, a plea of covenants performed, under our decisions, admits the covenants to be as set out in the declaration. *Steele v. McKinnie*, 5 Yer., 449; *Governor v. Organ*, 5 Hum., 161. Under these authorities, if the plea of covenants performed stood alone, and was the only defense set up by plea of defendant, it would have been unnecessary to prove the making of the covenants. But this was not the only plea of the defendant. The first plea pleaded was that "he did not undertake, agree or covenant as the plaintiff hath in its declaration alleged." The second plea says "he does not owe the plaintiff anything on the deed or covenants, or on account of any matters or thing whatever alleged or set

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forth in the declaration.” These, and other pleas of the twenty filed, negative the allegations of the declaration as to execution of the deed and covenants sued on. Each of these separate pleas made a separate and distinct defense, and were not waived by anything set up or conceded by the legal effect of the pleading itself in any other separate and distinct plea. Defendant may plead as many pleas as he has real grounds of defense. Code, § 4628 (S.) These pleas may be inconsistent—as, a defendant sued as executor may plead *ne unques executor, non est factum*, or a defendant sued for slander may plead not guilty, statute of limitations, and justification. *Langford v. Frey*, 8 Hum., 443; *Kelly v. Craig*, 9 Hum., 215.

The result of these authorities and their application is that there is no evidence in the record to support the decree or upon which this Court can decree in favor of the complainant, and the decree of the Chancellor is reversed and the bill dismissed at the cost of complainants. We add, however, that, upon an examination of the several interesting questions presented in this record as a whole, and so ably argued by the learned solicitors for both sides, we are satisfied this conclusion reaches the real merits of the case.

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BURKE v. STREET RAILWAY CO.

(*Jackson.* April 29, 1899.)

1. EVIDENCE. *Burden of showing contributory negligence on defendant.*

Plaintiff in an action for personal injuries is not bound to prove affirmatively that he was free from contributory negligence, but where his contributory fault does not appear upon his testimony, the burden of proof to establish it rests upon the defendant. (*Post*, pp. 410-412.)

Case cited and approved: *Stewart v. Nashville*, 96 Tenn., 50.

2. CHARGE OF COURT. *Erroneous as to use of street crossings.*

An instruction in an action for personal injuries sustained by one who was struck by a horse and wagon as he was crossing a street, which, in effect, states that whatever may have been the surroundings at the time and place of the accident, the defendant could drive across the crossing at any rate of speed he chose to do and yet presume that the plaintiff would see the way he (the defendant) was using the street and not get in his way, is erroneous. (*Post*, pp. 412-414.)

FROM SHELBY.

Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

GEORGE B. CLEVELAND and GEO. GILLHAM for Burke.

TURLEY & WRIGHT for Street Railway Co.

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McFARLAND, Sp. J. There are a number of assignments of error filed by plaintiff, Burke, but it is unnecessary to set these out in detail. It is sufficient to say they cover the errors complained of, which are decisive of the case. They are mainly directed against the charge of the Court below. Among other charges the plaintiff complained of as error were these: The Court, at the outset of his charge and as a concise summary of the necessities of plaintiff's case, says: "That you may have the material points of the case fairly before you, so that you may apply the evidence properly to them, the Court will now state to you what the material points of this case are:

"1. Mr. Burke, the plaintiff, must establish to your satisfaction, by a preponderance of the evidence, that he was exercising the care and caution of an ordinarily careful and prudent man in the manner in which he was using the crossing at the corner of Main and Madison Streets at the time of the accident."

This first prerequisite, as declared by the Court, to a recovery is, in effect, to throw at once the burden of proof upon the plaintiff to show that he was in the exercise of the care and caution of an ordinarily careful and prudent man at the time of the accident, and deprives him, at the very outset of the case, of the presumption that every man of sound mind will ordinarily avoid personal injuries.

This very question, upon whom the burden of

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proof of proper care or want of negligence was first cast, and when and how shifted upon plaintiff, was fully discussed in the opinion of this Court, Judge Beard delivering the opinion, in the case of *Stewart v. Nashville*, 12 Pickle, 50, in which the trial Judge said, among other things, that, in order to recover, the plaintiff "must show, by a preponderance of the evidence, that he was at the time of the accident in the exercise of ordinary care, and could not have avoided the accident by the exercise of care on his part." Says this Court, in commenting upon this charge: "In actions for personal injuries, and with regard to the question presented in this instruction, there is an irreconcilable conflict of opinion between the Courts. An examination of the cases will show that the Courts of Maine, Mississippi, Louisiana, Georgia, Massachusetts, North Carolina, Michigan, Illinois, Connecticut, Iowa, and Montana have adopted the rule that the burden is on the plaintiff to show affirmatively, as a part of his case, that no negligence or fault of his contributed proximately to the injury complained of, and, failing to show this, he cannot recover. Beach on Contributory Negligence, Sec. 422; 4 Am. & Eng. Enc. L., 93; *Pach v. O'Brien*, 23 Conn., 339; *Huckley v. Cape Cod R. R.*, 120 Mass., 255." These two cases last cited give the clearest and most concise reasoning supporting this contention. Upon the other hand, as is shown in the case of *Stewart v. Nashville*, *supra*, the Courts of

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many other States hold that the plaintiff has discharged his full duty when he has shown his injury and that the negligence of the defendant was its proximate cause. It then devolves upon the defendants to show contributory negligence as matter of defense, the presumption being in favor of the plaintiff that he was at the time of the accident in the exercise of due care, and that the injury was caused wholly by the defendant's negligent conduct. This is the doctrine of the Supreme Court of the United States, and of the Courts in Alabama, Kentucky, California, Kansas, Maryland, Minnesota, Mississippi, New Hampshire, New Jersey, Oregon, Idaho, Washington, Arkansas, Nebraska, Ohio, Pennsylvania, Rhode Island, West Virginia, South Carolina, Texas, Wisconsin, Vermont, and Colorado.

The Court quotes Judge Dillon (2 Dillon Mun. Cor., Sec. 1026), as adopting this latter view as the better one, as follows: "That where the plaintiff's contributory fault does not appear upon his testimony, the burden of proof to establish it rests upon the defendant; in other words, the plaintiff is not bound to prove affirmatively that he was himself free from negligence," saying, "We regard this as an accurate statement of the rule." Following this case, this charge of the Judge was erroneous.

The second prerequisite to recovery, as given in the charge, was as follows:

"2. He must establish to your satisfaction, by a preponderance of the evidence, that the defendant,

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Smith, was not exercising the care and caution of an ordinarily prudent man in the way in which he was driving his horse upon and along Madison Street, and that Smith's negligence was the sole cause of the injury."

This charge, in itself, totally ignores the question of remote and proximate cause, and needs no citation of authority in support of the suggestion that it is clearly erroneous. True the Court in the subsequent portions of his charge, and in another branch of the charge, modifies this portion quoted, and lays down the correct rule, and if this was the only error complained of we would be slow to reverse on this alone, but, looking further, we find the Court further charged the jury, in defining in what negligence consisted, as follows: "It consists in using the street without looking and seeing how it is being used by others, when, by looking, anyone of ordinarily good eyesight could have seen how the street was being used and what was the probability of a collision."

This part of the charge applies the rule as laid down between street cars and persons walking or in vehicles, and could have but little application to persons about to cross in front of vehicles not easily to be seen, by reason of obstructions or otherwise.

Again, after saying that Burke could presume that others would see him after he left the sidewalk, etc., says: "Smith had the right to presume that Burke or anyone else crossing Madison at Main

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Street would see the way Smith was using Madison Street, and not attempt to use the street right in front of his vehicle, and so near to it as to make it impossible for Smith to stop and avoid collision. Under these circumstances, if he attempted to cross and was injured, no recovery can be had." This portion of the charge in effect ignored the surroundings of the parties at the time and circumstances of the collision, and the rate of speed at which Smith may have been going. It tells them that, whatever may have been the surroundings at the time and place of the accident, Smith could drive across this crossing at any rate of speed he chose to go, and yet presume that Burke would see the way he, Smith, "was using Madison Street," and not get in his way. These charges were erroneous, and, taking the charge as a whole, we are of opinion it was misleading to the jury, and for this reason, although we are of opinion the plaintiff is not entitled to any very large damages, the case is reversed and remanded at cost of defendant.

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MEACHAM v. GALLOWAY.

(*Jackson*. May 2, 1899.)

1. HOTELS. *Proprietor's liability for boarder's goods.*

The proprietor of a hotel is not liable for the loss, by theft or otherwise, of the baggage and goods of a boarder, unless it is shown that the loss resulted from the wrongful or negligent act of himself or servants.

Case cited and approved: Pullman Palace Car Co. v. Gavin, 93 Tenn., 53.

2. SAME. *Boarder not guest.*

A person is a boarder, not a guest, who, for the purpose of entertaining a visitor, removes, with his family, from his home to a hotel in the same city, and takes rooms in the quarters allotted to regular boarders, for himself, family, and visitors for two or three weeks, at a special rate, less than that charged transient customers.

Case cited and approved: Manning v. Wells, 9 Hum., 746.

FROM SHELBY.

Appeal from the Chancery Court of Shelby County.
LEE THORNTON, Ch.

PIERSON & EWING for Meacham.

PERCY & WATKINS for Galloway.

McALISTER, J. This bill was filed in the Chancery Court of Shelby County against the defendant

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partnership, carrying on and operating a public inn in the city of Memphis known as the Peabody Hotel, to hold it liable for the value of a sealskin coat and sealskin cape and a valise, alleged to have been stolen from complainants' room while guests at said hotel. The Chancellor, upon final hearing, dismissed the bill. Complainants appealed and have assigned errors.

The first assignment is, the Court erred in holding that the relation of innkeeper and guest did not exist between complainants and defendants.

Second.—The Court erred in holding that, as boarders, the complainants were not entitled to recover. .

The facts may be briefly stated. The complainant and his wife, in December, 1897, were boarding in the suburbs of Memphis, and, desiring to entertain a young lady visitor, engaged three rooms at the Peabody Hotel. At the time Mr. and Mrs. Meacham moved to the hotel, he was told the rate would be \$2 per day if they stayed one week. Mr. Meacham stated that his family might stay as long as two or three weeks. As a matter of fact the family stayed less than two weeks. There is proof tending to show that complainant and his wife were assigned rooms on the fourth floor, among the regular boarders and families of the hotel, and this was done conformably to the request of complainant, and under an agreement to that effect made by him with the hotel clerk. The proof tends to show that the rate given, \$2 per day for each person, was a

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special rate given to all persons who remained longer than a week. Transient guests receiving the same accommodations would have paid higher rates. The proof shows that complainant, his family, and guest occupied three rooms, numbered respectively 139, 140, and 141. Complainant and his wife occupied room 141, while their son occupied room 140, the two rooms being connected by a door. It appears that after complainants had been staying at the hotel about a week, there was stolen from room 141, occupied by complainant and his wife, a sealskin coat valued at \$300, a sealskin cape valued at \$250, a boy's watch and chain valued at \$12, and a gentleman's valise valued at \$9.

The larceny was committed after 2 and before 4 o'clock P.M., on December 1, 1897. Mrs. Meacham testified that she had been wearing the sealskin coat during the morning, returned to the hotel about 12:30 o'clock, removed it, and hung it up in the wardrobe where the cape was hanging. She then locked the door, put the key in her purse, and went down to the parlor to see a lady acquaintance; that in about twenty minutes she returned to her room, prepared for lunch, again locked the door, and did not return to her room until 3:30, when she discovered the larceny. Mrs. Meacham testified that the door was locked and her key to the room was in her purse during the time the larceny was committed; that when she returned to her room and made the discovery the door was still locked.

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There is testimony tending to show that room 140 adjoining 141, with a door connecting, was not locked during the time covered by the larceny. The proof shows that, in addition to the key kept by Mrs. Meacham, there was a key to that room in the hands of the chambermaid, one in the hands of the fireman, and another kept at the office, which might be used by a bellboy, under the direction of the clerk, for the delivery of parcels, etc., into the room. Only one of these keys is accounted for on the day of the larceny—that held by the chambermaid, who testified that the key was in her possession, and that she did not enter the room. She testified that room No. 140, the adjoining room occupied by the boy, was not locked about 9:30 o'clock that morning, but that she did not return to it again until after the larceny.

Mrs. Meacham testified that since the larceny the manner of the chambermaid had undergone a marked change; that, while prior to the larceny she was a very attentive servant, afterwards she seemed quite frightened whenever she met Mrs. Meacham or her family.

Mrs. Meacham was asked by her counsel what she thought of the possibility of the garments having been placed in the valise and carried off in that way, to which she replied: "That is my idea; that they did that and walked through. No one could have suspected that it was not the gentleman's who took the valise, if a man had walked through the office with it, and if a man had, in fact, taken it."

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It should have been stated that, while room 141 was locked, the wardrobe in that room, where the garments hung, was not locked. The door to the room 141 was not broken open, but the door between 140 and 141 was open when the larceny was discovered. The proof fails to show whether the outside, or hall, door to 140 was locked at the time the larceny was committed. The fact that Mrs. Meacham fails to testify on this point makes it inferable that the hall door to 140 was not locked.

It was conceded on the trial that the watch and chain should have been deposited in the safe, in compliance with notices to that effect posted in the room, and that no recovery could be had for the loss of the watch and chain.

The Chancellor held that complainant and his wife were boarders at the hotel, and that, as the record did not disclose any culpable negligence, the defendants were not liable for the value of the articles. In support of the decree of the Chancellor, it was argued that complainant was not a guest, for he was neither a traveler, wayfarer, or transient comer. It is insisted: (1) He was a neighbor, (2) he came at a fixed rate, (3) he came for a definite time, and specified that he should be located with the families, the regular boarders, and not with the transients. It is argued that as to him the hotel was not an inn, but a boarding house; that he received a lower rate, and

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more limited liability was thereby incurred by the company.

An inn is defined as a house for the lodging and entertainment of travelers. *The People v. Jones*, 54 Barb., 311; *Lewis v. Hitchcock*, 10 Fed. Rep., 4. "A house where a traveler is furnished with everything he has occasion for while on the way." *Thompson v. Lacy*, 3 Barn. & Ald., 286. "Inns are houses for the entertainment of travelers—wayfarers, as they are called." *Caylis case*, 8 Co., 32; *Willard v. Reinhardt*, 2 E. D. Smith (N. Y.), 148; 11 Am. & Eng. Enc., Inns, 7; Bacon's Ab., Inns and Innkeepers; 3 Story on Bailments, Sec. 475.

So it has been held that common inns are instituted for passengers and wayfaring men, therefore, if a neighbor, who is no traveler, lodges there, and his goods be stolen, he shall not have an action. *Carter v. Hobbs*, 12 Mich., 52; 83 Am. Dec., 762. The prominent idea of the term guest is that he must be a traveler, wayfarer, or transient comer to an inn for lodging or entertainment. 11 Am. & Eng. Enc. L., 13. "Every one who is received into an inn and has entertainment there, for which the innkeeper has remuneration or reward for his service, is a guest. The relation of host and guest exists. This general definition, however, only includes those who are, in a legal sense, travelers or wayfarers, and boarders or persons who reside in the same place are not embraced by it. It is only travelers or wayfarers that innkeepers are bound to

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accept as guests, and it is to them alone that he is under extraordinary responsibility for the safe-keeping of beast and goods." *Russel v. Fagan*, 8 Atl. (Del.), 258; *Curtis v. Murphy*, 63 Wis., 4.

"The basis of this restriction is the peculiar liability of innkeepers to those who, as strangers and sojourners, are compelled to put up in an inn without knowing the character of the house. The liability of innkeepers is strict, and justly so, but it is a liability limited to their relation to travelers or wayfaring men. The law of civilized countries benignantly protects men away from home and from those resources with which the denizen or citizen can guard himself from wrong and protect his property from loss or injury." *Hornor v. Harvey*, 5 Pac., 329.

"When a traveler comes to an inn and is accepted, he instantly becomes a guest. The innkeeper, when he accepts him and his goods, becomes his insurer, and the innkeeper must answer in damages for the loss or injury of all goods, money, and baggage of his guest brought within his inn and delivered into his charge and custody, according to the usage of travelers and innkeepers; but he must be a guest, and before he can be a guest he must be a traveler. When he ceases to be a traveler or a transient or a wayfaring man, and takes up a permanent abode, even in an inn, he ceases to be an object of the law's especial solicitude, and he is no longer a guest, but a boarder; no longer a traveler, but a citizen." *Ib.*

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Again, in *Russel v. Fagan*, 8 Atl. Rep. (Del.), 258, Chief Justice Comegys said: "It is said that inns exist for the benefit of the traveling community. In fact, they are almost as much a necessity to travelers as the public means of locomotion are. In them wayfaring people of every kind, if they can afford the expense which the host charges for that service, can be accommodated with diet and lodging; in other words, can be entertained in their journeyings. The necessities of such people oblige them to solicit entertainment at the public or common inn, both for themselves and their beasts, where they travel with such, otherwise they would be without shelter and food. Because of this necessity, and that the host or entertainer is generally unknown to a party resorting to his house or inn, and that such party is compelled to trust himself and his property to his keeping, and that he is charged by the innkeeper for entertainment of himself and his beasts and the custody of his property, the law holds the innkeeper to a strict liability, not from any contract between the parties, but from the duty growing out of his public employment."

"It is said that there are two classes of persons who are entertained by innkeepers for reward, guests and boarders. The distinction between a guest and boarder, which it is difficult to draw, and which is variously stated, is based mainly upon the fact that boarders contract for a definite stay at specific prices."

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In *Lawrence v. Howard*, 1 Utah, 142, the Court said: "In this country, hotel keepers act in a double capacity, being both innkeepers and boarding house keepers. As innkeepers, they entertain travelers and transient persons, those who come without bargain as to time or price and go away at pleasure, paying for only actual entertainment received. As boarding house keepers, they entertain resident and regular boarders for definite lengths of time, and at specific prices previously agreed upon."

In *Shortcraft v. Bailey*, 25 Iowa, 553, the distinction between a guest and boarder seems to be this: "The guest comes without any bargain for time, and remains without one, and may go whenever he pleases, paying only for the actual entertainment he receives, and it is not enough to make one a boarder and not a guest that he stayed for a long time in the inn in this way."

The case of *Manning v. Wells*, 9 Hum., 746, is to the same effect. In that case it appeared plaintiff was boarding at the house of defendant, who kept a public inn in the city of Memphis, at \$12.50 per month, and lodged in a room that had no lock on the door, and that during the night, while he slept, his coat, worth \$12.50, was stolen. The trial Judge charged the jury that defendant was liable for the coat if lost or stolen from his house, unless it happened by the act of God or the public enemy, but if the plaintiff had exclusive use and possession of the room, then the defendant would

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not be liable. The jury found for the plaintiff the value of the coat, and the defendant appealed to this Court. Said Judge Green, viz.: "The doctrine stated by his Honor is certainly the true one as applicable to the goods of a guest in an inn, but a guest is a traveler or wayfarer who comes to an inn and is accepted. Story on Bail., Sec. 477. A neighbor or friend who comes to an inn, on the invitation of the innkeeper, is not deemed a guest. Bac. Abr., Inn & Innkeeper; 5 Com. Dig., Action on Cases for Negligence, B. 2. Nor is a person a guest, in the sense of the law, who comes upon a special contract to board and sojourn at an inn; he is deemed a boarder, and if he is robbed, the host is not answerable for it. 5 Bac. Abr., Inn & Innkeeper, 5.

"These principles are settled by the authorities, and founded in sound reason. A passenger or wayfarer may be an entire stranger. He must put up and lodge at the inn to which his day's journey may bring him. It is, therefore, important that he should be protected by the most stringent rules of law, enforcing the liability of the innkeeper. In such case, therefore, the law makes the innkeeper the insurer of the goods of his guest, except as to losses occasioned by the act of God or public enemies. But as a boarder does not need such protection, the law does not afford it. It is sufficient to give him a remedy when he shall prove the innkeeper has been guilty of culpable negligence."

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See 2d Ed. Am. & Eng. Enc. L., Vol. 4, title, Board, 592.

These authorities we think conclusive of the question presented by the first assignment of error, for it must be conceded, upon the undisputed facts in the record, that plaintiff and wife were mere boarders in defendant's hotel, and while occupying this relation the proprietors were not insurers of their property, but are only liable for culpable negligence. There being no proof of negligence, or that the articles were purloined by any employe of the defendant, the company is not liable. *Pullman Palace Car Co. v. Gavin*, 9 Pickle, 53.

Affirmed.

Viley v. Lockwood.

VILEY v. LOCKWOOD.

(*Jackson.* May 3, 1899.)

LIEN. *Of liveryman.*

A liveryman waives his lien on a horse by refusing to deliver it to the owner until he pays, in addition to the bill for feeding, an unwarranted claim for the training of the horse by a third person.

FROM SHELBY.

Appeal from the Chancery Court of Shelby County. STERLING PIERSON, Ch.

PIERSON & EWING for Viley.

F. P. POSTON, for Lockwood.

BEARD, J. This is an action of replevin for a blooded mare, brought by its owner. The defendant is a livery stable keeper, and resisted recovery on the ground that he had an unsatisfied lien for the keeping of the mare.

It is unimportant that the defendant had a lien on the animal if, under the facts of the case, he had waived it at the time of the demand by the owner for its return. The facts relied on by com-

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plainant to show a waiver are that defendant had been notified by Mr. Richardson, at whose residence the mare had been left in the stable of defendant, that he had a trainer's lien on her, and that she must not be delivered to the owner until his claim was paid. The complainant denied there was any such lien, and insisted that Richardson had been wrongfully in possession of the animal, and in this he is fully sustained by the record. He therefore declined to pay the Richardson claim, and demanded a delivery of the mare to him upon the payment of defendant's claim for keeping her. To this demand the defendant replied that he would not surrender her until, in addition to his own bill, the Richardson bill was paid, or a written contract was produced by complainant, showing that Richardson had no claim. Thereupon this suit was brought.

The demand made by Lockwood was unwarranted in law, and amounted to a waiver of his livery stable lien; it was the assertion of a claim adverse to the rights of the owner, and independent of, and inconsistent with, the lien for the keep of the horse. *Hamilton v. McLaughlin*, 145 Mass., 20; *Rogers v. Weir*, 34 N. H., 463; *Holbrook v. Wight*, 24 Wend., 169.

Affirmed.

Robinson v. Bierce.

ROBINSON v. BIERCE.*(Jackson. May 8, 1899.)***1. COVENANTS. When breached.**

Covenants of seizin, and against incumbrances, are breached and action lies at once if an incumbrance exists against the land at date of the deed; but a covenant of warranty is not breached, so that action lies, until actual eviction. (*Post*, pp. 431, 432.)

Cases cited and approved: *Barnett v. Clark*, 5 Sneed, 436; *Kincaid v. Britton*, 5 Sneed, 122; *Austin v. Richards*, 7 Heis., 665; *Crutcher v. Stump*, 5 Hay., 100; *Allison v. Allison*, 1 Yer., 16; *Ferriss v. Harshea, M. & Y.*, 48; *Kenney v. Norton*, 10 Heis., 388; *Austin v. McKinney*, 5 Lea, 499; *Collis v. Cogbill*, 9 Lea, 137; *Stipe v. Stipe*, 2 Head, 168; *Greenlaw v. Williams*, 2 Lea, 533; *Williams v. Burg*, 9 Lea, 455.

2. SAME. Burden of proof in action on.

If a covenantee pays off an incumbrance without submitting to suit and making defense, or affording his covenantor opportunity to defend against it, the burden is upon him, in a suit to recover of the covenantor the amount thus paid, to show that the incumbrance was a valid and subsisting one at the time of payment. (*Post*, pp. 432, 433.)

3. LIMITATIONS, STATUTE OF. Action to save right from bar.

An action to enforce a lien subject to statutory bar, must, in order to arrest the running of the statute of limitations and keep the lien alive, not only be brought in time, but must be prosecuted, after commencement, with such reasonable diligence as will save a *lis pendens* lien from loss by laches. (*Post*, pp. 433-438.)

Cases cited: *Mann v. Roberts*, 11 Lea, 57; *Williamson v. Williams*, 11 Lea, 355; *Anderson v. Tolbot*, 1 Heis., 407; *Zook v. Smith*, 6 Bax., 213.

4. SAME. Tax lien lost, when.

The lien for taxes is lost and ceases to be an incumbrance upon the property, within the meaning of the covenants of a war-

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ranty deed conveying it, where an action to enforce the lien, brought in due time, was permitted to slumber in the Court for eleven years without the taking of a single step therein. (*Post*, pp. 433-438.)

Acts construed: Acts 1885, Ch. 24.

FROM SHELBY.

Appeal from the Chancery Court of Shelby County. LEE THORNTON, Ch.

PIERSON & EWING for Robinson.

R. M. HEATH for Bierce.

McFARLAND, Sp. J. On February 16, 1886, C. W. Frazier, now deceased, sold to W. W. Bierce a lot in Memphis, and executed deed to him. On July 31, 1886, Bierce sold this lot to E. G. Robinson, complainant herein. At the time of sale by Frazier to Bierce there were some back taxes due on this lot, and when Frazier executed his deed to Bierce he also executed to Bierce a written agreement, in which it is recited that back taxes were due upon this lot, and that by this agreement Bierce agreed to take no steps about the same, nor interfere therein, and that the payment and settlement of same was to be left entirely and solely with said C. W. Frazier, and Bierce testifies that, at the time of the sale by him to Robinson, the

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latter was informed as to the arrangement between himself and Frazier in regard to the back taxes, and the original paper was turned over to him, and he was at the time fully aware that Frazier was to look after the tax matter, and take such course as he saw proper in respect thereto without interference on his (Bierce's) part, and Robinson assented to the arrangement.

In 1897, Robinson, through his agent, Avery, negotiated a sale of the lot to one Graves, but these taxes appearing on the books as unpaid, Graves refused to complete the purchase, and, therefore, a correspondence ensued between the parties about them, Robinson insisting that Bierce should pay them, and Bierce referred the matter to Mrs. Frazier, executor of C. W. Frazier.

On December 28, 1897, Bierce writes to Avery, agent of Robinson, in response to one from him saying: "We are this day writing Mrs. Frazier to have Mr. Heath consult with you immediately upon his return, and we verily believe there will be no trouble whatever in obtaining a check from Mr. Heath for whatever amount you may expend in relieving the Calhoun Street property from any tax incumbrance."

Upon receiving this letter, Avery had the taxes reduced as much as possible and paid the balance of taxes, which were State and county for the years 1873 to 1884, both inclusive, and amounting to \$422.99, including interest and costs, and thereupon

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filed his bill to recover the amount from Bierce. Bierce answered, claiming that these taxes were barred when paid by Robinson, and were not such an incumbrance upon the land as was covered by the warranty in his deed to Robinson.

In this deed executed by Bierce to Robinson, there were covenants of warranty and against incumbrances, but not of seizin.

There was a decree for complainant, from which defendant, Bierce, has appealed and assigned errors. The substantial question raised by the pleadings is, were these taxes, when paid by Robinson, such an incumbrance on the land as to justify Robinson in paying off same before actual eviction, and entitle him to sue his vendor.

Under the common law, where there is a covenant of seizin, this covenant is broken at once, if there be an incumbrance, and there can be an action at once for the breach. *Barnett v. Clark*, 5 Sneed, 436; *Kincaid v. Britton*, 5 Sneed, 122; *Austin v. Richards*, 7 Heis., 665.

If there be only covenants of warranty of title, these cannot be sued on without alleging and proving actual eviction. *Crutcher v. Stump*, 5 Hay., 100; *Allison v. Allison*, 1 Yer., 16; *Ferriss v. Harshea*, M. & Y., 48.

Complainants insist, however, that, under covenants against incumbrances, the authorities in Tennessee hold that a vendee may yield to a superior title or pay off an incumbrance or judgment or lien

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on the land, and sue for breach of the covenants without eviction. *Kenny v. Norton*, 10 Heis., 388; *Austin v. McKinney*, 5 Lea, 499; *Callis v. Cogbill*, 9 Lea, 137.

In *Kenny v. Norton*, *supra*, Norton had conveyed to Hubbard, trustee, to secure a debt. The trustee sold to Kenny. Norton owed unpaid purchase money, and the land was sold, upon proper proceedings, for payment of this purchase money, and was bought in by Kenny, who then sued Norton on his covenants of title made to Hubbard, trustee. Held, that this covenant of warranty ran with the land; that purchaser could pay off incumbrance fastened upon the land, suggesting that this was stated as the rule in *Stipe v. Stipe*, 2 Head, 168, but not definitely settled. The Court adds: "It must, as a matter of course, be a valid, subsisting incumbrance fixed on the land, and one which the party would be compelled either to discharge or have enforced against the land, and which was paramount to his own title, and by law would override it." To the same effect is *Austin v. McKinney*, *supra*.

Judgment of eviction, without actual eviction, is conclusive where notice is given to defend. *Greenlaw v. Williams*, 2 Lea, 533; *Williams v. Burg*, 9 Lea, 455.

In *Callis v. Cogsbill*, 9 Lea, 137, a judgment for possession of land, recovered against the widow of warrantor, holding under warrantor, in favor of a third party, held to be such eviction as would en-

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able a vendee of same land purchasing from warrantor to recover purchase money. But it is maintained, in such case, that the party who surrenders possession without actual eviction does so at his peril, and, in a suit against the warrantor, the burden of proof lies upon the plaintiff to show the paramount title.

The burden, then, being upon the plaintiff here to show this paramount title, the question is, Has the complainant done so? The complainant has assumed this burden, and has shown that the lot was assessed to one Parker for taxes 1873 and 1874, and to C. W. Frazier for the other years; that two tax bills were filed for the recovery of these taxes, and those tax bills, and the proceedings thereunder, are made parts of the record. There are several defects pointed out by defendant in these two proceedings, which are not necessary, however, to be noticed.

The facts important to be noticed are that Frazier is made a party to the first bill, and the complainant, Robinson, to the second. In the first case a *pro confesso* was taken against Frazier on August 19, 1887, and no further steps were taken as to him. He died in July, 1897, and in the second proceeding service of process was had on Robinson on April 14, 1890, and no further steps taken in this case. With these two tax suits in this condition, Robinson voluntarily paid off these taxes January 13, 1898, nearly eleven years after the last step taken in the second suit. Under the Act of

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1885, Ch. 24, all taxes are barred by limitation, unless suit is brought within six years from the first of January of the year on which taxes accrued. All of these taxes were barred, then, unless the bar is saved by the institution of the several suits therefor above mentioned. The institution of these suits preserved the lien of these taxes after bar operated, not as originally imposed, but by virtue of the institution of the suits themselves, and converted the statutory lien into one of *lis pendens*, and must be regarded as such at the time of the payment of these taxes, and the question then becomes one of *lis pendens*.

The contention of complainant is that by the very terms of the Act of 1885 itself, the institution of the suit for taxes, and nothing more, suspends the running of the statute, and an ingenious argument to this effect is based upon the word "instituted," in the Act, citing *Collins v. Insurance Co.*, 7 Pickle, 432. That case only decides that the filing of a bill in equity is the beginning or institution of a suit, and does not affect this question. The construction of this statute contended for by learned counsel for complainant is too narrow. The "institution" of a suit for taxes, properly begun against the proper parties, does stop the running of the statute. But, from its institution, that suit is subject to all the rules of practice and the results of laches or subsequent incidents, as any other suit, and if in this case there was such laches in its

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prosecution as lost to the State, county, or city the lien it acquired upon this property by the institution of its tax bill, or, to put it differently, if the State, county, or city having instituted its tax suits so as once to suspend the statute of limitations, failed to prosecute such suit so as to preserve this suspension, it lost by laches the benefits obtained by bringing the suit. This is the effect of laches in the prosecution of any suit.

This complainant, in his bill, states that when he bought this property from Bierce he had no knowledge of the existence of any back taxes thereon which were an incumbrance on the property, and, consequently, did not know of the existence of any tax suits. He was, therefore, an innocent purchaser with respect to this *lis pendens* of this tax suit.

In the case of *Mann v. Roberts*, 11 Lea, 57, failure to prosecute a suit for nearly four years was held to be such laches as lost the lien of *lis pendens* as against an innocent or *bona fide* purchaser of the land.

In *Williamson v. Williams*, 11 Lea, 355, the same principle was held, the Court saying: "The doctrine of many cases operates harshly upon innocent purchasers, and can only be sustained on grounds of public policy, where the private mischief must yield to public convenience (see John. Ch., 576). This being so, whenever the case is within this rule it must be enforced, but should not be extended beyond its settled requirements and well-de-

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finer conditions. The true grounds upon which the Courts should decide whether there has or has not been such a prosecution of any given suit as to preserve or destroy the continuity of the *lis pendens*, is by the application of the established principles of estoppel. The law imposes the duty upon the plaintiff or complainant to prosecute with proper diligence. The public have a right to expect it. If there is a failure to prosecute, the Courts have a right to treat the negligence as intentional and misleading to the public. If the degree of this negligence has been so great as to have induced the public to believe that the prosecution of the suit has been abandoned, they should then hold the plaintiff or complainant estopped from claiming to the contrary." 13 Am. & Eng., 891.

No fixed or arbitrary rule can be formulated by which to define laches, nor definite time fixed without which steps shall be taken in a given suit, or the same brought to conclusion. To have the benefit of *lis pendens*, however, there should be a close and continuous prosecution of the suit from its commencement to its close, taking into consideration the character of the case, the obstacles thrown in the way by the opposing litigant, and the usual law's delay. *Hayden v. Bucklin*, 9 Paige, 512.

A delay of seventeen months in one case, and of three years in another, has been held sufficient to deprive the creditor of a priority of lien by levy.

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Owens v. Patterson, 6 B. Mon., 489; *Deposit Bank v. Berry*, 2 Bush, 236.

This Court has held that the lien of a levy on land of Justice's execution may be lost, as against an intermediate innocent purchaser, by failure to file the papers in the Circuit Court for condemnation in a reasonable time. *Anderson v. Tolbot*, 1 Heis., 407; *York v. Smith*, 6 Bax., 213.

The lien of an attachment on land has been held to be lost by a delay of two years in the prosecution of the suit (*Petree v. Bell*, 2 Bush., 58), and of a mechanic's lien where there was a delay of four years. *Ehrmon v. Kendrick*, 1 Met., 146. These cases are all quoted with approval in the case of *Mann v. Roberts*, 11 Lea, 57.

It is true that laches in prosecution of a given suit may be explained, and, thus explained, *lis pendens* may be preserved for a great number of years, but that does not help the complainant in this cause. The rule as laid down in *Callis v. Cogbill*, *supra*, is that when the grantee in possession surrenders possession before eviction, or suffers eviction *pro tanto* by paying off an incumbrance, he must be prepared to justify such surrender by clearly making out the facts authorizing his acts. Here the complainant seeks to justify his payment of this incumbrance by showing pendency of these suits, and, in order to do this, exhibits records which disclose the gross laches in this prosecution, while he does not attempt to explain the effect of the laches.

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It is again insisted that these were tax suits, and they should be treated with great leniency because they involve a great number of tracts of land and a great number of parties, and that the delay is generally to the advantage of the defendants, and gives them time to raise the money to pay off the taxes. We know of no rule of sovereignty or divinity which hedges a tax suit with immunity from the rules of equity and practice which control other suits. The very facts stated by complainant, of number of parties and tracts of land involved, tend to obscure particular lots and names of individual owners, and render more secret the liens placed upon particular lots, and bring these cases clearly within the rule which requires more active diligence in the prosecution of suits which fix secret liens, in order that hurt may not fall to innocent parties.

Our conclusion is that the complainant has not shown that, at the date he paid the taxes sued for, they constituted such an incumbrance upon the lot bought by him, and justified him in paying them off before even a decree adjudging them to be a lien upon this lot.

The decree of the Chancellor is reversed, and bill dismissed at cost of complainant.

Schilling v. Darmody.

SCHILLING v. DARMODY.

(Jackson. May 8, 1899.)

1. HUSBAND AND WIFE. *Intermarriage extinguishes pre-existing debt.*

The intermarriage of a man with a woman to whom he has loaned money, evidenced by a note and secured by a trust deed of her real estate, extinguishes the debt and also the mortgage, as a matter of law. (*Post*, pp. 440-448.)

Cases cited: Joiner v. Franklin, 12 Lea, 422; Cox v. Scott, 9 Bax., 305; Bennett v. Read, 4 Heis., 440; McCampbell v. McCampbell, 2 Lea, 661; Castellar v. Simmons, 1 Tenn. Cas., 65.

2. MORTGAGES AND DEEDS OF TRUST. *Title reverts in mortgagor on satisfaction of secured debt.*

On payment or satisfaction of a debt secured by mortgage, the title to the property therein conveyed reverts in the mortgagor without a reconveyance. (*Post*, pp. 448, 449.)

Cases cited and approved: Hannum v. Wallace, 4 Hum., 143; Ross v. Young, 5 Sneed, 627; Carter v. Taylor, 3 Head, 30.

3. SAME. *Heir not required to pay off, when.*

The heir of a woman who gave a note and trust deed upon land to secure an indebtedness to one to whom she was afterwards married is not required, under the equitable maxim, "He who seeks equity must do equity," when he seeks the removal of a trust deed as a cloud upon the title to the lands, to pay the amount of the debt which the deed was executed to secure. (*Post*, p. 449.)

4. SUPREME COURT. *Will not remand for proof, when.*

The appellate Court may not remand a cause without a final disposition thereof on the merits, on the ground that full proof of the facts and circumstances were not made and to enable the making of such proof in the Court below, when the case does not fall under Shannon's Code, § 4905, because the applicant has had full opportunity to establish such facts if they

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existed, and the failure to do so must be imputed to inability or negligence upon the trial in the lower Court. (*Post*, pp. 449, 450.)

Code construed: § 4905 (S.); § — (M. & V.); § — (T. & S.).

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
JNO. L. T. SNEED, Ch.

H. C. WARINNER for Schilling.

JAS. H. MALONE, R. LEE BARTELS, and W. B. GLISSON for Darmody.

WILKES, J. This is a bill to enjoin the foreclosure of a deed of trust, and have the same set aside as a cloud upon complainant's title upon certain real estate, and to have the debt secured originally by said trust deed declared satisfied and extinguished. The Chancellor granted the relief prayed, and defendant has brought the record before us for examination, upon writ of error.

It appears that Henrietta Schilling, while a widow, borrowed from defendant, Darmody, \$1,700, for which she executed her note to him. She also executed a deed of trust upon her house and lot, to secure this note, to W. B. Glisson, trustee. This was in April, 1886. Mrs. Schilling was then keeping a boarding house in Memphis, and defendant

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and his family were boarding with her. Afterward they intermarried. There was no marriage contract or agreement fixing the property rights of either after marriage. In 1894 Mrs. Darmody (nee Schilling) died intestate, leaving complainant as her only heir, and defendant, her late husband, became her administrator. Defendant demanded of complainant payment of the note, which was refused, and he thereupon proceeded to foreclose the deed of trust, when he was enjoined by the bill in this case. The claim made in the bill is, in short, that the marriage of the parties operated by law as an extinguishment and satisfaction of the debt. The defendant by answer denies that such was the legal result of the marriage, and states that the parties continued to treat and regard the note and mortgage as existing obligations after as before the marriage. There was no cross bill. No proof was taken except an agreement in lieu of proof that after the marriage the wife obtained a loan upon this real estate from a building and loan association, and executed to it a deed of trust, in which the property was represented and warranted to be unincumbered, and as the property of the wife. The husband and wife joined in executing this mortgage, and there was a provision that, in case of sale to pay the debt, the surplus should go to Mrs. Darmody. The deed of trust from Mrs. Schilling to her subsequent husband was not registered until after her death.

It is insisted the Court erred in holding that the

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note had been satisfied by the marriage of the parties, and that it should not have directed its cancellation and the satisfaction and setting aside of the trust deed without at the same time requiring the amount due defendant to be repaid him, as evidenced by the note and trust deed. .

It is conceded that at common law the marriage of the mortgagor to the mortgagee would operate as a satisfaction of the mortgage debt and discharge and release of the trust. But it is insisted that the rules of common law have, by statute, in Tennessee, been changed in many respects, and, while there is no statute directly bearing on this point, yet the trend of legislation and judicial decision is in the direction of emancipation of married women and placing them upon the basis of *femes sole*. It may be granted that this is true so far as legislation extends, and it may also be granted that the Courts have recognized these innovations upon the common law and enforced them when authorized, but the Courts have not gone beyond the legislation and laid down any rules in regard to the property rights of married women not authorized by statute, on the idea that such rules are in accord with the general trend of legislation. The Courts have followed the legislation, but have not gone ahead of it, and, unless the rules of the common law have been expressly changed by statute, they are in full force in Tennessee. *Joiner v. Franklin*, 12 Lea, 422; *Cox v. Scott*, 9 Bax., 305.

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It is highly possible that legislation, in its process of emancipating women by statute, may succeed in making her the equal of man in every respect, notwithstanding she has always been his superior, but the Courts can only follow, and not lead, in this experiment, and these rules in regard to married women apply in Courts of Equity as well as in Courts of Law. Courts of Equity have, however, always recognized certain rights of married women and enforced them even where they are not recognized in Courts of Law, such as the right of the wife to a settlement out of her personal estate as against her husband or his creditors and her marriage contracts with her intended husband and contracts with regard to her separate estate.

Mr. Story, in his work on Equity Jurisprudence, Vol. 2, Sec. 1370, says: "By the general rules of law the contracts between husband and wife before marriage, become, by their matrimonial union, utterly extinguished. Thus, for example, if a man should give a bond to his wife, or a wife to her husband, before marriage, the contract thereby created would, at law, be discharged by the intermarriage. Courts of Equity, though they generally follow the same doctrine, will, in special cases, in furtherance of the manifest intentions or objects of the parties, carry into effect such a contract made before marriage between husband and wife, although it would be avoided at law." As, for illustration, "An agreement made between husband and wife before mar-

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riage, for a settlement of their separate estates, will be enforced in equity, though void at law, for equity will not suffer the intentions of the parties to be defeated by the very act (marriage) which is designed to give effect to such contract." See *Bennett v. Read*, 4 Heis., 440; *McCampbell v. McCampbell*, 2 Lea, 661; *Castellar v. Simmons*, 1 Tenn. Cas., 65.

But in these and similar cases the contracts and agreements are enforced because the parties intended them to remain and be in force notwithstanding the marital relation, and so provided by express agreement. In the present case, no feature of that kind exists. The loan and trust deed were not made, so far as the record shows, in contemplation of marriage, and there was no agreement that the debt should continue in force after the marriage, and the parties made no provision by contract to change the legal effect of the marriage union.

In Indiana, where the rights of married women are very much the same as in Tennessee, the almost exact question here presented was elaborately considered in the case of *Long v. Kinney*, 49 Ind., p. 235. The facts are as follows: On January 8, 1872, Eliza McCabe, a single woman, executed a mortgage on real estate to Michael Kinney, to secure the payment, at maturity, of a promissory note made by said Eliza McCabe, payable to said Michael Kinney. Some time after the execution of the note and mortgage, Eliza McCabe and Michael Kinney intermar-

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ried. After the marriage, Michael Kinney transferred the note and mortgage to one Long. Long brought suit against Kinney and his wife, and sought to foreclose the mortgage. The wife insisted that by her marriage to Kinney the note and mortgage were dissolved and discharged. The syllabus of the case is: "An unmarried woman executed a note and mortgage on her real estate to secure its payment, and afterwards married the payee of the note, the mortgagee, after the marriage, assigned the mortgage and delivered the note to a third person, who brought suit to foreclose the mortgage."

It was held, in substance, that by the marriage the debt and mortgage were discharged and the action could not be maintained. This case goes fully into the whole question, showing that the rule at common law was well established, and could not be changed except by express statutory enactments, and that, although under the statutes of Indiana declaring that both her real and personal property should remain her own, after marriage as before, there was "no statute which attempts to save the right of action of the husband against the wife on contracts entered into by her before the marriage." Authorities were cited, and it was shown that the case presented did not fall within the exceptions allowed in Courts of Equity, which exceptions relate to marriage contracts and the like, the performance of which is intended to take place after marriage. The Court cites as authorities: 1 Blackstone's Com.,

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442; 1 Kent's Com., 129; Story's Eq. Jur., Secs. 1367 and 1370. To the same effect, see *Barnet v. Harshberger*, 105 Ind., 410; *Henegar v. Lomas*, 145 Ind., 287; Cord on Mar. Women, Sec. 154, p. 82; Reeves Dom. Rel., 167, star p. 2; Reeves Dom. Rel., 53, star p. 2; and cases cited above from Tennessee Reports. A case in apparent conflict is that of *Powers v. Lester*, 23 N. Y., 527. The syllabus is: "The marriage of a female mortgagee with the mortgagor, since the act for protection of married women (Ch. 200 of 1848), does not extinguish her rights of action on the mortgage.

"Where such mortgagee unites with her husband in a junior mortgage of the same land, the act affects only her inchoate dower interest, but does not, in the absence of words for that purpose, impair her right to priority of lien."

The facts were: That a suit was instituted to foreclose a mortgage bearing date April 1, 1861, executed by Melvin Power to plaintiff, upon certain land, to secure a bond of \$951.92, due April 1, 1855. Melvin Power (mortgagor) married the plaintiff, the creditor and mortgagee, in the year 1852. After marriage, and in 1856, Mrs. Lester, the plaintiff, united with her husband in another mortgage embracing, with the land in the previous mortgage, a large amount of other lands, to secure to Lester her husband's bond for \$60,000. This mortgage by no words purported to affect the wife's separate estate, and no words indicated that it was

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to operate on her mortgage. Lester foreclosed the mortgage in his favor, and at the sale bought in all the lands embraced in the mortgage to him, but the rights of the wife in the lands mortgaged to her were reserved in the foreclosure decree. She filed her bill against Lester to establish her prior right, and it was held that there was still due her \$1,516.98, and the usual decree was pronounced in her favor, and Lester appealed.

The Court of Appeals fully recognized the rule of unity at common law and its legal effect, but adverted to the fact that the common law rule had been changed by statute in New York (1848, 1849). That statute declares "that the property of any female who shall thereafter marry, and which she shall own at the time of the marriage, shall continue her separate estate, as if she were a single woman," and that this was an express change in the common law rule, which left no doubt for construction. In that case the female creditor afterwards became the wife of the debtor, and as the statute expressly and plainly reserved her rights in the property she owned at the time of her marriage, this debt and mortgage, which were her personality, were reserved to her by the plain statute, in derogation of the common law rule, which would have extinguished her claim. It is probable that in New York no such legislation exists, changing the common law rule as to the effect of the marriage upon the husband's rights, when he occupies the

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status of creditor. At all events, that case is wholly different from the one at bar, and is based upon a plain, positive, express statutory provision. No such statute exists in Tennessee. The husband, as before, takes the wife's personalty as at common law, subject alone to the right of her creditors. Under a statute in New York the unity of persons which disabled the wife from suing her husband, has also been repealed. Code N. Y., § 114. And so in *Butler v. Ives*, 139 Mass., 202, and *Wright v. Wright*, 54 N. Y., 437, it was held that the note remained in force, notwithstanding the marriage, but this was by virtue of the special statutes of Massachusetts and New York changing the common law rule as to the effect and result of a marriage.

If we are correct in holding that the note was satisfied and discharged by the result and by virtue of the marriage, there remains but little more to be considered in the case. The trust deed provides upon its face that if the note shall be paid, the deed shall be satisfied and quitclaimed according to law.

It has been repeatedly held that on payment of a mortgage or trust debt by the debtor, the estate of the mortgagee or trustee ceases and the legal title revests in the mortgagor or grantor *ipso facto*, without a reconveyance. This upon the idea that a trustee takes only such title and estate as is required for his trust. *Hannum v. Wallace*, 4 Hum.,

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143; *Ross v. Young*, 5 Sneed, 627; *Carter v. Taylor*, 3 Head, 30.

The doctrine invoked that a party who seeks the aid of a Court of Equity must first do equity, and that the Court will not remove a cloud upon a title and decree a cancellation of a deed and a revestiture of title except on condition that the debt which the deed was executed to secure be paid, is not applicable in this case, for the debt is paid and the mortgage is satisfied, in our view of the case, and complainant is entitled to have it so declared when an attempt to enforce it is made, as is done in this case.

The title having revested in the mother of the complainant by the satisfaction of the note, descended to him upon her death, as there was no child by her marriage with Darmody, and, being the heir, he is entitled to have the cloud removed therefrom.

It is insisted that the Court, in any event, should remand the cause, without a final disposition on the merits, to the Court below, to the end that full proof may be made of circumstances and facts to show that the parties intended to keep the debt in force after the marriage as before. This insistence was made in the answer, and it must be presumed that if there was such proof or circumstances from which such intention could be inferred, it would have been shown. The case does not fall within

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the provisions of the statute (Shannon, § 4905), because defendant has had full opportunity to establish such facts if they existed, and the failure to do so must be imputed either to inability so to do or negligence in not doing so in the Court below.

The decree of the Court below is affirmed with cost.

Carroll v. Taylor.

CARROLL v. TAYLOR.

(*Jackson.* May 8, 1899.)

CHANCERY PRACTICE. *Cross bill disposed of in advance of original bill.*

The Chancellor, upon discovering, on a hearing of the whole case, that the original cause is unprepared for a decree, and that the auxiliary case made by the cross complainant is prepared and of such a nature as to admit of full determination without affecting the original cause, may dispose of the latter and hold the former open for further adjudication.

Case cited: *Cocke v. Trotter*, 10 Yer., 213.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
LEE THORNTON, Ch.

CARROLL & McKELLAR for Carroll.

H. J. LIVINGSTON, T. B. TURLEY, and F. H. HEISKELL for Taylor.

BEARD, J. The question presented in this record is, Can a decree be entered in favor of the complainant in a cross bill, leaving the case made by the original bill undisposed of, because at the time not ready for trial?

If the present case was as it is assumed in ar-

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gument to be—that is, one where the Chancellor, in advance of the preparation of the original cause and independent of it, had taken up the cross bill and entered a decree upon it—we would regard it as unsound practice, and so the subject of reprobation. But such is not the fact. The decree recites that the cause came on for hearing on the original bill, the answers thereto, the cross bill, and the order *pro confesso* taken against the defendants to the same, and, the Court finding the original cause not ready to be disposed of, and that of the cross complainant in a condition for a decree, therefore pronounces it. While the matters with regard to which relief is sought by the cross bill, are possibly sufficiently incidental to the subject of the original bill as, perhaps, to have saved it from a demurrer if one had been interposed, yet they are so remotely connected with it that a decree could be entered settling finally and conclusively the rights of the parties, without in the least affecting the controversy arising on the original bill. This being the condition of the case, we are not prepared to hold that the decree now complained of was improvidently entered.

It is true the cross bill is a mere auxiliary of the original bill, growing out of the litigation presented by that bill. So intimately are the two connected in practice that in *Cocke v. Trotter*, 10 Yer., 213, it is said where “the complainants in a cross bill set it down for hearing, they did an act the

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legal effect of which, perhaps, was to set down the principal cause also." And again, that the cross bill "incorporates itself with the original bill, and must be heard with it." This case, however, does not determine the exact question presented by this record—that is, where, upon a hearing of the whole case, the Chancellor discovers the original cause unprepared for a decree, and the auxiliary case prepared and of such a nature as to admit of full determination without affecting the original cause, can he dispose of the latter, and hold up for further adjudication the former?

The Supreme Court of the United States has said: "Both the original and cross bill constitute one suit, and ought to be heard at the same time, consequently 'any decision or decree in the proceedings upon the cross bill is not a final decree in the suit, and not the subject of an appeal to this Court.' " In accord with this case, and furnishing the authority upon which it is rested, are *Cross v. De Valle*, 1 Wall., 5, and *Ayres v. Cann*, 17 How., 591.

In each one of these last three cases the question arose on an appeal from a decree of the lower Court pronounced on a cross bill, leaving the main cause undisposed of, and in each one the appeal was dismissed as premature from a decree interlocutory and not final. In neither of the cases is it intimated that the practice in question was an erroneous one.

While granting to the full extent the auxiliary

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nature of a cross bill, yet it is so far independent that the complainant in the original bill failing altogether in maintaining it, the cross complainant may press his claim on his pleading to a decree, and thus obtain full relief upon it, exactly as if it was an original bill. This being so, we cannot see that there was any improper practice pursued in the present case.

It is proper to add that the Chancellor exercised his legal discretion, under § 4889 of the (Shannon's) Code, in allowing the appeal in this case.

Laughlin v. Johnson.

LAUGHLIN v. JOHNSON.

(Jackson. May 8, 1899.)

1. DESCENT AND DISTRIBUTION. *Inheritance by illegitimates.*

At common law illegitimates had no inheritable blood, but this has been changed by statute in this State. (*Post*, p. 456.)

2. SAME. *Same.*

Under Acts 1866-67, Ch. 36, Sec. 10 (Shannon's Code, § 4169), providing for inheritance from the mother by illegitimates, equally with legitimate children, and that, "should either of such children die intestate, without child, his or her brothers and sisters shall, in like manner, take his or her estate," illegitimate children share equally with legitimate children the estate of a legitimate child who dies leaving no child, without regard to the source from whence the property came, whether from the mother or elsewhere. (*Post*, pp. 456-461.)

Act construed: Acts 1866-67, Ch. 36, Sec. 10.

Code construed: § 4169 (S.); § 3274 (M. & V.); § 2423a (T. & S.).

Cases cited: *Riley v. Byrd*, 3 Head, 19; *Woodward v. Duncan*, 1 Cold., 562; *Scoggins v. Barnes*, 8 Bax., 560; *Murphy v. Portrum*, 95 Tenn., 605; *Shepherd v. Carlin*, 99 Tenn., 64.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
JOHN L. T. SNEED, Ch.

YOUNG & YOUNG and JAMES M. GREER for
Laughlin.

D. M. SCALES and RANDOLPH & RANDOLPH for
Johnson.

Laughlin v. Johnson.

BEARD, J. The complainant, Laughlin, is the illegitimate son, and the defendants, Amanda F. Johnson and Josephine P. Clifton, are the legitimate daughters of one Eveline Chunn, who departed this life many years ago. Louisa J. Hardwick, who was also a legitimate daughter of the same mother, died intestate some time before the institution of this suit, leaving neither husband nor lineal descendants. At the time of her death she was the owner of realty in the city of Memphis, acquired by her by deed from a former husband, and the question in this record is, Does complainant share with the legitimate sisters of the deceased in this property?

At common law a bastard had no inheritable blood, so that if complainant is to be let into an interest in this property as an heir, it must be by virtue of some statute.

It is conceded that the Acts of 1851-52, Ch. 39, and of 1885, Ch. 34, Sec. 1, carried into the Code of Tennessee (Shannon's, §§ 4166, 4167, M. & V., §§ 3273, 3274), gives no support to this claim, but it is insisted that it is provided for in the last clause of Sec. 10, Ch. 36, of the Acts of the Legislature of 1866-67, found in Shannon's Code, at § 4169. That section, as a whole, is as follows: "Where any woman shall die intestate, having a natural born child or children, whether she also have a legitimate born child or children, or otherwise, such natural born child or children shall take, by the general rules of descent and distribution, equally with

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the other child or children, the estate, real or personal, of his or her and their mother; and should either of such children die intestate, without child, his or her brothers and sisters shall, in like manner, take his or her estate."

No doubt is entertained that the first clause of this section removes the taint of illegitimacy so far as to confer inheritable blood on the natural born child, and thus enable him or her, as the case may be, to share equally with the legitimate child or children in the estate of their mother who dies intestate. It is the last clause in the section which raises the present controversy, the complainant insisting that, upon a natural and necessary interpretation of its terms, he is entitled to a share in the estate of Mrs. Hardwick, although it did not come from the mother common to himself and the defendants, while, on the other hand, these defendants insist it is to be construed with regard to the first clause of the section, and that, taken altogether, to use the words of the solicitors of the defendants, in their brief, "the statute applies only to the estate of the mother, real or personal, of the illegitimate, or, in other words, its language confines such illegitimate person to the estate, real or personal, of his, her, or their mother."

We have had occasion in two other cases involving a construction of this statute, upon facts similar to those found in this record, and with like arguments, pressed with so much earnestness and

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ability in this case, to carefully examine this statute, and in each of these cases we have announced a conclusion adverse to the contention of the defendants. We find nothing new, either in this record or in the argument presented. A re-examination of the question satisfies us that the conclusion heretofore announced is sound. To hold otherwise, we think, would be to do violence both to the literalism of the statute as well as the purpose of the Legislature in enacting it. It is but a culmination of legislation begun in this State in 1819, the design and effect of which has been to change radically the status of illegitimates before the law. The Acts of 1851-52 (Shannon's Code, § 4166), heretofore referred to, provided for the disposition of the estates of illegitimates who died intestate without child or children, husband or wife, while Section 10, Chapter 36, of the Acts of 1866-67, was a more advanced step in effectuating the general design to give ample relief to this unfortunate class of persons. The first part of the section places legitimate and illegitimate children upon a common ground of inheritance as to the mother's estate, where she dies intestate, while the last clause, in distinct terms, does the same thing for these two classes as to the estate of any one of either class who may die intestate and wanting lineal descendants, without regard to how or from whom this estate was acquired.

As has already been indicated, the Act of 1851-52, Ch. 39, was not the beginning of legislation with

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regard to illegitimates. For the first time, by Sec. 1 of Ch. 13 of the Act of 1819, the State materially altered the common law rule on this subject. That section is as follows: "When any woman shall die intestate, having natural born child or children, and no legitimate child or children, such natural born child or children shall take, by the general rules of descent and distribution, the estate, real and personal, of his, her, or their mother, and should either of such children die intestate without child, his or her brothers and sisters shall in like manner take his or her estate." For some reason the salient features of this Act were not brought forward into the Code of 1858, but they were embodied in broader terms and with comprehensive effect in the Act of 1866-67 which we are now considering.

The Act of 1819 came up at least twice for construction by this Court—once in the case of *Riley v. Byrd*, 3 Head, 19, and again in *Woodward v. Duncan*, 1 Cold., 562. In the first of these cases it was held that, under the Act, legitimate brothers and sisters could inherit from an illegitimate, and that the legitimates setting up their claim in that suit were entitled to the land acquired by their bastard deceased brother, while in the last it was ruled that under the provisions of the statute, an illegitimate could not be let in the estate of a legitimate half brother. These two cases illustrated the inequality which was worked under this Act.

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To correct this, and to create mutual rights of inheritance as between legitimate and illegitimate brothers and sisters when either should die intestate and without child, was the evident purpose of the Legislature carried into the Code (Shannon's), § 4169. And this view was clearly indicated in *Scoggins v. Barnes*, 8 Bax., 560. Nor is there anything in the cases of *Murphy v. Portrum*, 95 Tenn., 605, and *Shepherd v. Carlin*, 99 Tenn., 64, in conflict with the conclusion here announced.

It is insisted, however, that this construction is out of line with *Giles v. Wilhost*, 48 S. W. Rep., a case decided by the Chancery Court of Appeals, whose finding was afterwards affirmed by this Court. That case involved a controversy between an illegitimate sister of an illegitimate brother, who died without issue and intestate, and an illegitimate niece of that brother over the estate of the deceased. It arose under and called for a construction of § 4166 of the Code (Shannon). That section is as follows: "When an illegitimate child dies intestate without child or children, husband or wife, his estate shall go to his mother, and if there be no mother living, then equally to his brothers and sisters by his mother, or descendants of such brothers and sisters."

The words of difficulty in this section were the last, "descendants of such brothers and sisters," and the question was, Should the line of descent thus provided for be extended to illegitimates, or be confined to legitimates? And as these terms admitted of

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either construction, in recognition of the well-settled rule of interpretation of statutes that the common law must be allowed to stand unaltered as far as is consistent with a reasonable construction of the new law (*Arthur v. Baker*, 11 Md., —; *Greenwood v. Greenwood*, 28 Md., 369; *Horne v. M. & O. R. R. Co.*, 1 Cold., 72; *Eaton v. Dickinson*, 3 Sneed, 396) the phrase was construed as if it read “legitimate descendants,” etc. In other words, the Courts would not go further in the recognition of inheritable blood in illegitimates than the Legislature had unmistakably gone, and it being left in doubt by the use of the terms in question what line of descendants should take under the conditions prescribed by that section, a construction was adopted which involved the least departure from the principles of the common law.

It is otherwise, however, as to the clause of the statute on which the present case depends. It is so plain and unambiguous that we think little, if anything, is left for judicial interpretation. The decree of the Chancellor is reversed, and the cause remanded.

Carpenter v. Frazier.

CARPENTER v. FRAZIER.

(*Jackson.* May 9, 1899.)

1. CORPORATIONS. *Registration of facsimile of great seal.*

It is a substantial and sufficient compliance with the requirement that the facsimile of the great seal of the State appearing on a charter of incorporation shall be registered along with the other portions of the charter, as a condition precedent to its validity, if the Register, at the proper place on the record, makes a scroll or other similar device, manifestly intended as a facsimile of the great seal, however inartistically it may be executed. (*Post*, pp. 464, 465.)

Code construed: § 2026 (S.); § 1693 (M. & V.).

Case cited and distinguished: *State v. Brewer*, 7 Lea, 682.

2. BUILDING AND LOAN ASSOCIATIONS. *Amount due on mortgage.*

The method announced in *Rogers v. Hargo*, 92 Tenn., 35, for ascertaining amount due on mortgage of a building and loan association is reaffirmed. (*Post*, p. 466.)

Cases cited and approved: *Rogers v. Hargo*, 92 Tenn., 35; *Carpenter v. Richardson* (oral).

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
LEE THORNTON, Ch.

F. H. HEISKELL for Carpenter.

R. M. HEATH for Frazier.

Carpenter v. Frazier.

MCALISTER, J. This bill was filed in the Chancery Court of Shelby County to foreclose a mortgage executed by the defendants to the Southern Building & Loan Association. The bill recites that, October 1, 1894, C. W. Frazier, deceased, and Letitia A. Frazier, his wife, mortgaged certain real estate in Memphis to said association to secure a loan of \$4,000. The bill further showed that on November 1, 1894, C. W. Frazier executed a mortgage on the same property to Mrs. P. A. Edmonds. This was about one month after the mortgage was executed to the building and loan association.

C. W. Frazier died, leaving a will, in which he left the property included in the mortgage in trust to secure debts to Mrs. P. A. Edmonds, and then to his wife, Mrs. L. A. Frazier.

The answers denied that the Southern Building & Loan Association was a corporation, and denied that the transaction in question was in accordance with and governed by the law of building and loan corporations. Mrs. P. A. Edmonds, in her answer, claimed that her mortgage was superior to the one sought to be foreclosed. The ground upon which the corporate existence of the Southern Building & Loan Association was attacked is that, while the charter purports to have been registered in Knox County, Tenn., the facsimile of the great seal of the State of Tennessee was not registered, as required by law.

Shannon's Code, § 2026, provides how corporations

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are formed. It says: "The said instrument [application for incorporation], when probated as hereinafter provided [§ 2542], with application probates and certificate, is to be registered in the county where the principal office of the company is situated, and also registered in the office of the Secretary of State; and a certificate of registration given by the Secretary of State, under the great seal of the State, shall, when registered in the Register's office of said county, with the facsimile of said seal, complete the formation of the company as a body politic, and the validity of the same in any legal proceeding shall not be collaterally questioned." The argument is that the corporation enjoys no vitality or existence until these conditions precedent are observed.

The particular infirmity in the present charter, which, it is claimed, has destroyed, or, rather, prevented, corporate life, was the failure of the Register to make a facsimile of the great seal of the State in registering the charter. It is insisted the certificate of Johnson, Register of Knox County, shows that the so-called great seal of the State of Tennessee, as recorded in Knox County, did not have emblazoned thereon the two pictures which symbolize agriculture and commerce. It is true the Register, in copying the great seal, has not made a very artistic representation, but it bears intrinsic evidence that it was intended for the great seal of the State, and it so recited.

Counsel cite numerous authorities to the effect

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that when compliance with certain statutory requirements is made a condition of corporate life, non-compliance is fatal, and the corporation cannot be viewed as a *de facto* concern. In *State v. Brewer*, 7 Lea, 682, it appeared defendant was indicted for selling liquor within four miles of an incorporated institution of learning, and, in order to convict him, it was necessary to show the McKinney High School was a corporation. It was claimed to be incorporated, but the incorporators had failed to register the certificate of the Secretary of State and the facsimile of the seal of State. This Court held it was not a corporation, saying: "As we have seen, these things were not done when the offense is alleged to have been committed, hence the McKinney High School was not then an incorporated institution in the sense of the statute."

But we are of opinion these authorities are not applicable, since there was a substantial compliance with the statute in the present case. The great seal of the State was spread upon the record. The fact that the emblems of commerce and agriculture were not copied, was due, perhaps, to the fact that the Register was not an artist or sufficiently expert to draw the pictures. It was not expected that the Register should have a scenic artist or illustrator in his office. In respect of the registration of the seal of any deed a scroll is sufficient.

In 20 Am. & Eng. Enc. L., 560, note 5, it is said: "The seal of a deed is sufficiently recorded

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if indicated upon the record by the word 'seal' written within a scroll or some similar device." Citing *Dale v. Wright*, 57 Mo., 110; *Huey v. Wan Wie*, 23 Wis., 613; *Pulney v. Cutter*, 54 Wis., 66; *Switzer v. Knapp*, 10 Iowa, 72 (S. C., 74 Am. Dec., 375).

The third assignment of error is that the decree in favor of complainant is excessive and that there was no competitive bidding when the loan was made to C. W. Frazier, and hence the transaction was illegal and usurious.

The amount decreed by the Chancellor was determined by the rule laid down in *Rodgers v. Hargo*, 92 Tenn., 35, and applied by this Court at last term in *Carpenter v. Richardson*.

The averment of the answer that there was no competitive bidding for this loan was not proven. We find no error, and the decree is affirmed.

Memphis City Bank v. Smith.

MEMPHIS CITY BANK v. SMITH.

*(Jackson. May 13, 1899.)*1. MORTGAGES AND DEEDS OF TRUST. *Application of proceeds.*

Under a trust deed that directs application of the proceeds of the trust property (1) to expenses, (2) to debts due bank A as its president may direct, (3) to debts due bank B as its president may direct, and further provides that the trust is created for "the exclusive protection and indemnity of said banks against loss on account of indebtedness" to them of the maker of said trust deed, and further authorizes said banks to exhaust all personal and collateral securities held by them, respectively, before making application of the proceeds of the trust—under such deed the president of bank A, although he is likewise the president of bank B, and the two institutions are owned and operated by the same parties, has no authority to divert any part of the proceeds of the trust to payment of debts due bank B until all debts of bank A are fully paid, at least so far as sureties thereon are concerned. (*Post*, pp. 468-472.)

2. SAME. *Same.*

Nor, under such trust deed, has the president of said banks, or the president of either of them, any authority to divert a collateral owned jointly by the maker of the deed and another, and deposited to secure their joint note, to the payment of an unsecured debt of the maker of the deed. (*Post*, p. 472.)

3. USURY. *Allowed under answer.*

Under his answer to a bill seeking to recover a note against him, a surety may have reference to ascertain any credit for usury paid by his principal upon the notes sued on and upon notes out of which they originated as renewals. (*Post*, pp. 472, 473.)

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
LEE THORNTON, Ch.

Memphis City Bank v. Smith.

SCRUGGS & HENDERSON for Bank.

H. F. DIX and TURLEY & WRIGHT for Smith.

WILKES, J. This is a bill to collect from W. J. Smith as indorser upon five notes executed by L. B. Eaton. His liability, so far as presented by the answer in this controversy, turns principally upon the provisions of certain trust deeds made to secure these as well as other notes, and especially a trust deed made to R. A. Parker on June 6, 1894, by Eaton, the maker of the notes. This trust deed confirmed three other trust deeds made to James and J. T. Frost, and provided for debts due the City Bank, as well as others due the Security Bank. The instrument provides that if the indebtedness secured by it is not paid, the property shall be sold and proceeds applied first to expenses, and second to the indebtedness due the Memphis City Bank as the acting president of that bank may direct, and third to the payment of debts due the Security Bank as its acting president may direct, and the balance to Eaton.

Then follows this statement: "The trust herein provided is for the exclusive protection and indemnity of the Memphis City Bank and Security Bank of Memphis against loss on account of the indebtedness of Eaton to them, and said banks may exhaust all security, personal or collateral, to their several debts before applying the proceeds of this trust to the debts secured, and may make application in such

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manner to be directed by the presidents of said banks as to save said banks harmless against loss after exhausting all security, personal or collateral, specifically pledged as security for the several debts.”

Some \$16,000 was realized from a sale under this deed of trust, and was applied by the trustee after paying expenses, to certain specific debts due the City Bank, and then to debts due the Security Bank.

The defense set up by Smith in his answer is that the proceeds of the trust property, under the trust deed of June 6, 1894, should have been applied exclusively to debts owing the City Bank before any of it was diverted and paid to the Security Bank, since to that extent such application would have inured to his benefit and exoneration, and also that the proceeds of certain abstract stock being joint property of himself and Eaton, should have been applied to their joint obligation, and that such is the plain construction of both the trust deed upon the lands and the collateral note pledging the abstract stock.

The Chancellor held with this contention, and directed the proceeds of the trust property to be applied wholly to the City Bank, but in such a way as to protect it from loss, and to that end directed the unsecured debts and liabilities held by that bank on Eaton to be first paid. The Chancellor also held that the City Bank had misapplied one-half of the proceeds of the abstract stock to debts of Eaton not indorsed by Smith, and, so far as this applica-

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tion was made, it was to be treated as void and held for nothing, and the debts thus paid were to be treated as still subsisting, and the proceeds of this abstract stock to be applied to the debts, on which Eaton and Smith were both liable. A reference was had as to this, and also as to usury paid by Eaton to the bank. From this decree the Memphis City Bank appealed and has assigned errors.

It is insisted that the Chancellor erred in holding that the proceeds of the trust should be applied to the payment of debts due by L. B. Eaton to the Memphis Bank until they were satisfied, before anything could be paid to the Security Bank; that it was error to order a reference as to usury, and that it was error to hold that the half proceeds of the abstract company stock should be applied to debts on which Eaton and Smith were both bound, to the exclusion of the debts on which Eaton alone was bound.

The first assignment, put in a little different form, is that the City Bank has the right to waive its preference to be paid out of this trust fund, in favor of the Security Bank, and look to Smith, the indorser, for the payment of its debts, the effect of which will be to deprive Smith of any benefit of these trust funds. On the other hand, it is insisted that while the City Bank had a right to apply the trust funds to any debt it holds against Eaton, secured or unsecured, as its President might direct, and so as to protect it from loss, still it could not

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waive its right to the fund in favor of the Security Bank.

The contention, narrowed down, is that the City Bank could apply the proceeds to the unsecured debts of Eaton held by it, in preference to those secured by Smith, but it could go no further, and could not permit the Security Bank to take the fund and leave the City Bank to rely upon Smith's indorsement. And that to allow the fund to be thus diverted, would be to indirectly give the Security Bank the benefit of Smith's indorsements to the City Bank, inasmuch as it would appropriate funds which otherwise would go to the relief of Smith or his indorsements, to debts in the Security Bank on which he is not bound.

We are of opinion the decree of the Chancellor is correct. The proper construction of the deed of trust of June 6, 1894, is that the debts due the City Bank of Memphis are to be paid before those to the Security Bank. The option given to the acting president to apply the proceeds of the trust property as he may direct, means that he may apply it, at his discretion, between the secured and unsecured debts held by the City Bank, and not that he may divert it to the Security Bank, leaving debts due the City Bank unpaid; and the fact that he is president or acting president of both banks and the banks are virtually owned and operated by the same parties, does not matter. The two banks and the debts owing to them are to be treated as separate

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and independent, and each standing upon its own rights, and the trust deed does not mean that they may be treated together as a common creditor and the proceeds applied between the debts held by both as though they were all held by one creditor.

The clear provision is that the debts due the Security Bank stand in a third class, and are to be paid only after those due the City Bank, which stand in a second class and have preference over those of the Security Bank, but, as between themselves, may be paid as the acting president may direct.

In like manner, the abstract company stock was pledged to secure debts on which both Eaton and Smith were bound upon the collateral note, which set forth the terms of the pledge, and the proceeds should have been so applied, as there was no discretion given the president of the bank as to this fund, and the property pledged was the joint property of the two. The Security Bank is not a party to this suit. It was made such party on motion, but subsequently this order was vacated and set aside, and the decrees in this case are made without regard to it.

The Chancellor, in his decree, held that Smith, under his answer, was entitled to a reference, to ascertain the usury exacted of Eaton upon the notes upon which he was indorser, and any renewals of the same, but not for any usury exacted on transactions outside of these notes, or notes out of which they originated as renewals, and his order of refer-

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ence was framed upon this idea and basis. A cross bill filed by Smith was accordingly dismissed, inasmuch as its object was to impound usury collected from Eaton on transactions other than those in which Smith was indorser, and from this there is no appeal, but upon Smith's answer the reference was made, as before stated, as to usury paid on debts on which he was bound.

It is said this reference as to usury was error, but no reason or ground is assigned why it should be treated as error.

We are of opinion that all of the matters of defense in this case would have been more properly set up by cross bill, but no exception is taken in this Court or the Court below upon this ground, and the defendant is clearly entitled, on the merits, to the reference for usury and to a proper application of the proceeds of the trust property, in order, so far as possible, to relieve him of his liabilities, and the decree of the Chancellor reaches the merits, and it is affirmed and the cause remanded for further proceedings. Appellant will pay cost of appeal.

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STREET RAILROAD CO. v. HOWARD.

(*Jackson*. May 18, 1899.)

1. SUPREME COURT. *Will not set verdict aside, when.*

This Court will not set aside a verdict for plaintiff for want of evidence to support it, when the plaintiff's testimony on the trial makes out a case, although it is impeached by his statement on a former trial that did not make out his case. The question presented was one of credibility of the witness, not of sufficiency of evidence, and therefore peculiarly a matter for the jury. (*Post*, pp. 476, 477.)

2. EVIDENCE. *Res gestæ.*

The statement of a street car motorman, "that he saw plaintiff and thought he would get off the track," made fifteen minutes after the collision that resulted in plaintiff's injury, at the place of the collision, but after plaintiff had been extricated from the car wheels and his wounds washed, is not admissible as part of the *res gestæ*. (*Post*, pp. 477, 483.)

Cases cited and approved: *Denton v. State*, 1 Swan, 278; *Diwidie v. Railroad*, 9 Lea, 309; 144 Mass., 148; 51 N. Y., 295; 53 Mich., 322; 74 Mo., 553; 119 U. S., 99; 45 Kan., 503.

3. STREET RAILWAY COMPANIES. *Rights to use of track.*

The rule that at crossings a street railway company has, in the operation of its cars, no preferential right of way over vehicles and pedestrians, has no application to the operation of its cars over that portion of its track between crossings, where, under the law, it has a superior, though not exclusive, right of way. (*Post*, pp. 483-485.)

Case cited and approved: *Citizens' Rapid Transit Co. v. Segrist*, 96 Tenn., 123.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby County. L. H. ESTES, J.

Street Railroad Co. v. Howard.

TURLEY & WRIGHT for Railroad Co.

JAS. M. GREER for Howard.

MCALISTER J. Howard commenced this suit in the Circuit Court of Shelby County against defendant company to recover damages for personal injuries. The case has been tried several times. The first trial resulted in a verdict for the plaintiff for \$1,000; the second ended in a mistrial; the third and last resulted in a verdict and judgment against the defendant for \$3,250. A new trial having been refused, the company appealed and has assigned errors.

The plaintiff resided in the State of Mississippi, and, at the time of the accident, had stopped over in the city of Memphis while *en route* to visit his parents. That night, between 8 and 9 o'clock, plaintiff, accompanied by a friend, started to visit some ladies who lived on Marley Avenue, in the suburbs of Memphis. Plaintiff admits taking several glasses of beer prior to his departure, but claims he was not intoxicated. He and his friend boarded a Johnson Avenue car, operated by defendant company, and when Marley Avenue was reached they separated, Howard remaining on the south side of the street car track while Elliott went off to look for the house they wished to visit. Plaintiff, after waiting some time for Elliott to return, started north on Marley Avenue in search of the house. Plaintiff crossed the track going north at the intersecting

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street, and, after an unsuccessful search for the house, returned south again, and, while trying to cross the track of defendant company, he was struck by a car running west and very severely injured.

There is evidence tending to show that the railroad track at this point is laid out in a straight line for nine hundred feet east of Marley Avenue, and that a lighted car can be easily seen that distance. This fact is admitted by plaintiff and is undisputed.

On the first trial the plaintiff testified that when he retraced his steps, failing to find his friend, and walking eight or ten steps on the track, he stopped to look at a house facing the old Raleigh road, and that, just as he stopped, a car came up from his side and rear, striking him and inflicting the personal injuries for which he sues. He further testified on that trial that he could have seen the car approaching for a distance of nine hundred feet, and could have heard it, but, as a matter of fact, he neither saw nor heard a car.

On that trial the plaintiff further testified that just as he stepped into the track, from the north toward the south, he was struck by the car; that he had neither looked nor listened for a car to the east or west, from which directions cars were likely to come, and that he was not thinking about a car at all.

On the last trial the plaintiff testified that before attempting to cross the track he stopped and looked

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around, across, and in every direction, and that he did not see a street car coming.

Overruling the motion for new trial on the last verdict, the Court said, viz.: "This case has been tried three times. The first time there was a verdict for \$1,000. The Court set the verdict aside because plaintiff's own testimony showed clearly that he did not look or listen for a car. In granting the new trial the Court held the failure to look or listen was such contributory negligence that it ought to defeat plaintiff's right of recovery." The Court then remarked that on this (the last) trial Howard's testimony is much more favorable to his case. He appears to be an honest man, with a purpose to tell the truth, and thereupon the motion for new trial was overruled. The question, then, upon this assignment of error, is whether there is any evidence to support the verdict.

The conflict in the testimony of the plaintiff was a matter that went to his credibility as a witness, and was for the jury. This Court could not adjudge his testimony unworthy of credit and say there was no evidence to sustain the finding of the jury. At last it is a matter for the settlement of the jury upon the irreconcilable statements claimed to have been made.

The second assignment is that the Court erred in admitting declarations made by the motorman after the accident was over. These declarations were admitted upon the theory that they were

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part of the *res gestæ*. These declarations are proved by two witnesses who visited the scene of the accident immediately after it occurred. One of the witnesses testified that he was at his home in the neighborhood, about two hundred and forty feet away, and that his attention was first attracted by what he denominates a terrible noise, as if made by the sudden reversal of the car. He went out to his front gate, and was informed that some one had been run over. Witness immediately ran down there and found the plaintiff under the car, the conductor and motorman trying to extricate him. Witness assisted the employes of the road, and the plaintiff was finally removed from the track. Another witness then came up, and he was sent back to his home, one hundred and fifty feet away, for a basin and towel. He returned, and the plaintiff was then washed. After all this had been done, which consumed, probably, fifteen minutes, one of the witnesses asked the motorman how it occurred. The motorman replied that "he saw plaintiff, but thought he would get off the track."

The question presented is, whether the statements of the motorman were part of the *res gestæ* or merely narrative of a past occurrence. The true rule on this subject is thus expressed by Mr. Wharton, in his work on Criminal Evidence, Sec. 262, viz.: "*Res gestæ* are events speaking for themselves through the instinctive words and acts of participants, not the words and acts of participants when

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narrating the events. What is said or done by the participants under the immediate spur of the transaction becomes a part of the transaction, because, then, it is the transaction that then speaks. In such cases it is not necessary to examine as witnesses the persons who are participants in a transaction thus instinctively spoken or acted. The question is, Is the evidence offered that of the event speaking through the participants, or that of the observers speaking about the event? In the first case what was thus said can be said without calling those who said it; in the second case they must be called. Nor are there any limits of time within which the *res gestæ* can arbitrarily be confined. They vary, in fact, with each particular case. A distinguishing feature of declarations of this class is that they should be the necessary incidents of the litigated act, necessary in this sense, that they are a part of the immediate concomitants or conditions of such act, and are not produced by the calculated policy of the actors. In other words, they must stand in immediate causal relation to the act and become part of the action immediately producing it, or which it immediately produces." Again, at Sec. 259, Vol. 1, of the same work, edition 1888, he says: "The *res gestæ* may, therefore, be defined as those circumstances which are the automatic and undesigned incidents of a particular litigated act, and which are admissible when illustrative of the act. Incidents that are imme-

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diately and unconsciously associated with the act, whether such incidents are doings or declarations, become, in this way, evidence of the character of the act. They are admissible, though hearsay, because, in such cases, from the nature of things, it is the act that creates the hearsay, not the hearsay the act. It is the power of perception unmodified by recollection that is appealed to, not of recollection modifying perception. Whenever recollection comes in—whenever there is opportunity for reflection and explanation—then statements cease to be parts of the *res gestæ*. Aside from the temptations to the parties, when they have time to collect themselves, to palliate or aggravate, there is a tendency to exaggeration apt to swerve the memory of those who were witnesses of any casualty or collision when they talk about it after it is over. Hence it is important for the interests of truth and justice that the statements of neither parties nor bystanders, made after the event, should be received on trial unless under the responsibility of an oath and with opportunity of cross-examination.”

This question has frequently been before this Court. In *Denton v. State*, 1 Swan, 278, the facts were that Denton and Sullivan, in the presence of several other persons, quarrelled and fought. They were separated, when Denton threw a chair at Sullivan, but no one saw it strike him. Sullivan was thrust out of the house. In twenty-five or thirty

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minutes he returned to the room, and complaining of being sick, was put to bed. On being interrogated as to the cause of his sickness (Denton not being present), he replied that "Denton had hit him on the belly with a chair."

It was held that these statements of Sullivan formed no part of the *res gestæ*, but were mere hearsay and inadmissible as evidence. It was said in that case that declarations, in order to be part of the *res gestæ*, must be contemporaneous with the principal transaction of which they form a part.

"This principle of law is founded upon the clearest dictate of reason. The declarations were evidence, because they are a part of the thing doing. If, therefore, the thing shall have been done and concluded, declarations then made are not evidence."

The Court further remarked: "That the scuffle between the parties had ended twenty-five or thirty minutes before these declarations were made, and that the principal transaction had so completely ended as that these statements cannot be connected with it as part thereof, and they are mere hearsay and not evidence."

In *Dividdie, Admr., v. L. & N. R. R.*, 9 Lea, 309, it appeared that after deceased had been run over, the train was stopped, and the engineer, conductor, and other train hands, gathered around the body, which was still breathing. It was held that statements made around the body by operatives of

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the train as to how the killing occurred were inadmissible.

Booth on Railroads thus lays down the law on this subject: "In an action to recover damages for personal injuries, the declarations of a servant of the defendant are not admissible against it as a part of the *res gestæ*, unless it appears affirmatively, before such declarations are admitted, that they were made at the time the injuries were inflicted. This principle applies to acts as well as to declarations, and to all cases alike. If the declaration offered in evidence was not an actual part of the transaction on account of which the plaintiff seeks damages, it is inadmissible, although made at the place of the accident in the presence of those who witnessed it, and immediately after it occurred. In such cases time is a very important, although not always the controlling, element in determining the question of competency. But in each case such declarations must be excluded if they do not tend to give character to a contemporaneous act, and are merely narrative, however nearly connected in time they may be with the main fact in controversy." See also *Wilson v. Railroad Co.*, 144 Mass., 148; *Whittaker v. Street Ry. Co.*, 51 N. Y., 295; *Johnson v. Ice Co.*, 53 Mich., 322; *Adams v. Railroad Co.*, 74 Mo., 553; *Railroad Co. v. O'Brien*, 119 U. S., 99; 45 Kan., 503; 19 L. R. A., 733.

We are of opinion the Circuit Judge was clearly in error in admitting the statements of the motor-

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man under the circumstances stated, and this assignment of error is sustained.

The Court also erred in charging the jury, as follows: "The conduct of the motorman (Sparrow) and of plaintiff (Howard) must be measured by exactly the same rule. To vary the rule in the least in favor of either one, is to violate your oath. They both were using the street; their rights to use the street were exactly the same."

This error is intensified by the failure of the Court to give special instruction No. 3, which is as follows: "The defendant had the superior right of way, although not the exclusive right of way, of that portion of the highway occupied by its tracks, which are used or about to be used, by the transit of cars between street crossings—that is, between blocks, while the traveler has the right to use the street car tracks when not occupied, or about to be occupied, by the cars, but it is the traveler's duty to give the right of way to the cars upon their approach and not impede their progress."

The well-established rule is that street railroads have the superior, though not the exclusive, right of way between street crossings, and all the evidence in this case places Howard between street crossings when injured.

The doctrine contended for in this special instruction was approved by this Court in the case of *Citizens' Rapid Transit Co. v. Segrist*, 12 Pickle, 123, where the Court uses this language: "In his late

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work on Street Railways, at Section 304, Booth says: 'As already stated, as a general rule, especially between street crossings, cars have a right of way superior to other vehicles and pedestrians. This preferential right must be exercised in a reasonable and prudent manner. But this rule does not apply to crossings, or street intersections; here neither has a superior right to the other; the right of either must be exercised with due regard to the right of the other.' "

In Section 303 Booth on Street Railroads states the law as follows: "A reconsideration of the grounds of the earlier decisions, aided by time and experience, has resulted in establishing a rule, now well-nigh universal, that a street car has, and from the necessities of the case must have, the right of way upon that part of the street upon which alone it can travel paramount to that of ordinary vehicles, but that this superior right does not prevent others from driving along or across its tracks, at any place or time, when by doing so they will not interfere with the progress of the cars. In this case the better right is not an exclusive right, but, being paramount to the extent stated, it will be enforced against all who needlessly oppose obstacles to its exercise. Other travelers, therefore, must yield the right of way. Therefore the driver of a private vehicle may cross the tracks, and this right is not confined to occasions when other portions of the street are crowded or obstructed, and may drive

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along and upon the tracks, if he uses due diligence not to interfere with the passage of the cars." *Sherman v. Street Ry.*, 44 Cal., 418; *Street R. R. v. Ingram*, 131 Ill., 659; *Hearn v. Street Ry.*, 34 La., 160; *State v. Foley*, 31 Ia., 527; *Commonwealth v. Hicks*, 7 Allen, 573; *Rascher v. Street Ry.*, 51 N. W. Rep., 463 (Mich.); *Brooks v. Street Ry.*, 22 Neb., 816; 49 N. J. Law, 468; 126 N. Y., 625; *Adolph v. Street Ry.*, 76 N. Y., 530; 24 Atlantic, 596 (Pa.); 141 Pa. State, 615.

It will be observed that throughout the charge the Court, time and again, tells the jury, in effect, that the rights of both parties between street crossings were equal. It is true he does state that the same degree of care, to be on the lookout for pedestrians between crossings, as at crossings, is not required of motormen, nor are they to use the same degree of speed between crossings as at crossings; but this instruction is wholly apart from the rule that between street crossings the company has a preferential right, which principle was not recognized by the Court, but a wholly different doctrine announced. For the reasons indicated, the judgment is reversed and the cause remanded.

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A. LANDRETH CO. v. SCHEVENEL.

(Jackson. May 22, 1899.)

1. FRAUD. *Does not vitiate contract or settlement, when.*

Fraud in procuring the settlement and compromise of the claims of a wholesale merchant against a retail merchant cannot be predicated of the latter's failure to keep his promise to continue the business and his relation with the former, although he did not intend to keep the promise when he made it, as it relates to a matter in the future, and, besides, the benefit from the continuance of the business is uncertain and purely speculative. (*Post*, pp. 488-491.)

Cases cited: *Farrar v. Bridges*, 3 Hum., 565; 81 Fed. Rep., 64; 15 C. B., 207.

2. RESCISSION. *Statu quo.*

To authorize the rescission of a contract or settlement for fraud, the parties must be put in *statu quo*. (*Post*, p. 492.)

3. SAME. *Promptness required.*

A party seeking to repudiate a contract for fraud of the other party, must do so at once upon learning of the facts constituting the fraud. (*Post*, pp. 492, 493.)

Cases cited and approved: *Woodfolk v. Marley*, 98 Tenn., 467; 93 U. S., 62; 48 S. W. R., 729; 83 N. Y., 300.

4. FRAUDULENT CONVEYANCE. *Debts must be shown.*

Complainant must prove debts due him in order to justify the setting aside of an alleged fraudulent conveyance of his debtor at his instance. (*Post*, pp. 492, 493.)

Case cited: 17 Wall., 521.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
JNO. L. T. SNEED, Ch.

A. Landreth Co. v. Schevenel.

S. M. NEELY for Landreth Co.

WATSON & FITZHUGH and CARROLL & MCKELLAR
for Schevenel & Co.

McFARLAND, Sp. J. This was a bill filed by the A. Landreth Co. against A. W. Schevenel & Co. for the purpose of rescinding and setting aside a settlement made between the parties, and also to subject certain real estate to the payment of complainant's debts, conveyed by Schevenel, one of the partners, to his wife.

The facts are that A. W. Schevenel & Co., a firm composed of A. W. Schevenel and one Pace, was doing business in Memphis, Tennessee, in 1897. Beginning with August 20, 1897, the complainants sold to A. W. Schevenel & Co. goods amounting to sixteen hundred and ninety-six and $\frac{16}{100}$ dollars (\$1,696.16). A. W. Schevenel & Co. were engaged in the grocery business in Memphis. On November 8, 1897, the firm made an assignment to A. B. Duncan, as trustee, for certain creditors, and preferring some of the creditors, but the complainants were not included in the preferences. On March 1, 1898, the complainants and said firm compromised their indebtedness, by which the firm paid thirty-three and one-third ($33\frac{1}{3}$) per cent. of their indebtedness, amounting to five hundred and sixty-five and $\frac{41}{100}$ dollars (\$565.41) in cash, and executed their three notes, due six, nine, and twelve months, for the balance of their account. It is this settlement

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and compromise that this bill is filed to set aside. It also seeks to set aside a conveyance of a tract of land made by A. W. Schevenel to his wife March 25, 1897, but not recorded until November 8, 1897.

The allegations in the bill upon which relief is predicated as to this compromise, are as follows: "This settlement was accepted by your complainants solely upon the express representation that the firm of Schevenel & Co. would continue in the same business as they had conducted and would resume business as before the assignment. Your complainants aver they would not have accepted any order of settlement from A. W. Schevenel & Co. less than their whole debt in cash, except such settlement as the above, and this was entered into upon, and in consequence of, repeated assurances that the firm of A. W. Schevenel would resume business and their business relations with your complainants, and it was due absolutely and entirely to these representations and assurances that your complainants accepted settlement on this basis. Your complainants aver these representations were false and fraudulent, and known by the firm to be so, and that these representations have never been carried out by the firm, nor have they paid any of the above notes, although two of them have long since become due and payable." No offer to return the five hundred and sixty-five and $\frac{41}{100}$ (\$565.41) dollars was made.

The ground upon which it was sought to set

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aside the conveyance to the wife is that that conveyance was made during the existence of the original indebtedness, and, that indebtedness not being settled, the conveyance was, therefore, void as to these existing creditors.

There was a demurrer filed by the defendants, which raised the question properly as to the sufficiency of this bill. This demurrer was allowed, and the complainants have appealed to this Court.

The first question to be determined is whether or not the allegations of the bill, as to the representations made by A. W. Schevenel & Co. as to future business, if done fraudulently, is sufficient to rescind the contract without the repayment of the cash received. Independent of the question of whether an offer to return the cash received is necessary, we are of opinion that the grounds alleged in the bill are totally insufficient. "Misrepresentations, in order to be fraudulent, must be of facts at the time or previously existing, and not mere promises for the future." 8 Am. & Eng. Enc. L., 636; *Fenwick v. Grimes*, 5 Cranch. C. C., 439; *Long v. Woodman*, 58 Me., 49; *Burt v. Bowles*, 69 Ind., 1; *Bethell v. Bethell*, 92 Ind., 318; *Bigham v. Bigham*, 57 Tex., 238; Kerr on Fraud and Mistakes, 88.

"Fraudulent expressions of opinion are generally insufficient to justify the rescission of a contract executed and acted on by the parties. An action for rescission for fraud cannot be predicated on a promise to do something in the future, although the

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party promising had no intention of fulfilling the promise at the time it was made." 1 Beach Mod. Law of Contracts, Sec. 797, and cases cited.

In *Baelie v. Taylor*, 136 Ind., 368 (36 N. E. Rep., 269), the Court declared that these principles, as above announced, are elementary. "As distinguished from the false representation of a fact, the false representation as to a matter of intention not amounting to a matter of fact, though it may have influenced a transaction, is not a fraud at law, nor does it afford a ground of relief in equity." Kerr on Fraud and Mistake, 88. Thus where it was alleged that the defendant fraudulently represented that he would grant the plaintiff an easement by locating a street, this was held not to be fraud. *Richter v. Irvine*, 28 Ind., 26. So, where one was induced to grant another a lease on the representation that he intended to use the premises for a certain purpose, whereas he intended to use, and did use, them for a totally different purpose, it was held that relief could not be granted. *Feret v. Hill*, 15 C. B., 207. "Statements of forecast, opinion, or expectation that are in substance matters of inference, cannot be considered false representations justifying the rescission of a contract." *Green v. Society Anonyme, etc.*, 81 Fed. Rep., 64.

The case of *Farrar v. Bridges*, 3 Hum., 565, is, in principle, directly in point, and conclusive of the correctness of the Chancellor's decree sustaining the demurrer in this case. Says the Court in that

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case: "Averments of fraudulent intention and fraudulent combination are made with sufficient liberality throughout the bill, but no fraud is shown to distinguish this case from any other in which a party neglects or refuses to comply with his engagements and to pay for the property he purchases. The prayer of the bill is that the deed be canceled. Bridges has demurred to the bill, and his demurrer has been allowed by the Chancellor. His decree must be affirmed. Fraud, indeed, vitiates a contract into which it enters, but mere noncompliance with the terms of a contract, in not paying the stipulated consideration, is not fraud. If a party conveys his land by deed upon a promise that he shall be paid, it will not authorize the cancellation of the deed in chancery by the mere allegation of fraudulent intent."

It is another elementary principle as to rights and remedies, that some wrong or hurt must have been done from which relief must spring. The hurt here is purely speculative. Had defendants continued in business, and continued to purchase from complainant, profits to plaintiff would have been uncertain and purely speculative. The relief here prayed, though different, is analogous in principle to claim of damages for breach of contract. In such cases such damages cannot be recovered, because incapable of accurate estimation.

We have examined the cases referred to by learned counsel for complainants, and especially the case of

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Cross v. McKee, 53 Miss., 538, and, without reviewing these cases in detail, we think that each one of them may be differentiated in some important and material fact and principle from this case at bar.

It is an elemental principle, as applicable to rescission of contract or settlement, by fraud or otherwise, that upon rescission the parties must be put in *statu quo*, and independent of the mere question whether the repayment of this five hundred and sixty-five (\$565) dollars will be a prerequisite, there are other facts shown by the bill which demonstrate that the parties could not be restored to the *status quo* in which they were when this compromise was made. It is shown, after compromise and settlement of this debt was made, that the trustee had wound up his trust, and, after winding up his trust, had turned over the balance of the property of A. W. Schevenel & Co. in his hands to that firm, and that they have dissolved, and one of the partners, not sued in this action, has removed to the State of Arkansas, and they are each now in separate business. It would be impossible, from this account, to restore the parties or the assets of that firm into the hands of the trustee.

There is still another principle applicable to the denial of relief to the complainants in this case. This compromise and settlement was made March 1, 1898. This bill was not filed until January 12, 1899. The complainants must have known, long before this bill was filed, that this firm had ceased

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to do business and had gone out of existence, and yet they waited to see whether or not these notes would be paid. It is incumbent, in such case, that the party seeking repudiation shall do so at once upon learning the ground upon which the rescission is ultimately based. "It is a settled rule that the right to rescind a contract for fraud must be exercised immediately upon its discovery, and that any delay in doing so, and the continued employment, use, and occupation of property received under a contract, will be deemed an allegation to confirm it." *Shiffer v. Dietz*, 83 N. Y., 300.

"A party who desires to rescind, in whole or in part, a transaction of this kind, must, upon the discovery of fraud, repudiate it, and cannot, after acquiescing in its ratification, avail himself of such defense." *Kerns v. Perry*, 48 S. W. Rep., 729; *Woodfolk v. Marly*, 98 Tenn., 467; *Grimes v. Sanders*, 93 U. S., 62.

The settlement of this first question of necessity settles the other. The conveyance to the wife was, in fact, before the indebtedness to the complainants. It was, at any rate, registered before this compromise settlement, and this is conclusive against the complainants' right to set it aside now. Besides, there are no sufficient allegations in the bill upon which to base a decree setting aside this as a fraudulent conveyance.

"A Court of Equity will not exercise its jurisdiction to release property applicable to the payment

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of these debts, unless the debts are clear and undisputed, and there exists some special circumstances requiring the interposition of the Court to obtain possession of and apply the property." *Public Works v. Columbia College*, 17 Wallace, 521.

The decree of the Chancellor is confirmed, with costs to the complainant.

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*BOYD v. HUNT.

(Jackson. May 22, 1899.)

1. EASEMENT. *Alley.*

Failure to use an alley, in order to amount to an abandonment of an easement therein, must be accompanied by some act of the owner of the dominant estate clearly indicating his purpose to set up no further claim, and such intent cannot be inferred from the mere fact, in connection with long nonuse, that the owner of the servient estate excavated under and projected his buildings above the alley, erected at its entrance a gate, which, however, was not inconsistent with the enjoyment of the easement, and may have been attributed by the owner of the easement to a desire to keep out the public. (*Post*, pp. 496-508.)

2. SAME. *Created by stipulation in deed.*

A stipulation in a deed, that the lot conveyed shall adjoin an alley, to be carved out of the grantor's adjoining property, and to be perpetually kept open for the common use, imposes a servitude upon the land thus set apart as an alley, and in this land the grantee has the dominant, and the grantor the servient, estate. (*Post*, pp. 496-498.)

Cases cited: *Crutchfield v. Car Works*, 8 Bax., 242; *Brew v. Van Deman*, 6 Heis., 433.

3. SAME. *Passes by transfer of dominant estate.*

And such easement passes by conveyance of the lot to which it is thus annexed. (*Post*, pp. 498, 499.)

4. SAME. *Nonuser.*

Mere nonuser, however long continued, affords no sufficient evidence of abandonment of an easement created by express grant. The failure to use must be accompanied by some act of the owner of the dominant estate, clearly indicating his purpose to set up no further claims, in order to work abandonment. (*Post*, pp. 499, 500.)

*On the question of the nonuser of an easement, there is a review of the decisions in note to *Welsh v. Taylor* (N. Y.), 18 L. R. A., 535.—REPORTER.

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Cases cited and approved: *Railroad v. French*, 100 Tenn., 209; 83 Ky., 628; 110 Ill., 264; 49 N. Y., 348; 82 Pa. St., 208; 47 N. J. Eq., 421 (S. C., 10 L. R. A., 276); 38 N. J. Eq., 20; 11 Gray, 423; 140 Mass., 205; 112 Mass., 224; 18 L. R. A., 535.

Cited and distinguished: *Monaghan v. Memphis Fair Co.*, 95 Tenn., 108.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
LEE THORNTON, Ch.

J. H. MALONE for Boyd.

MORGAN & MCFARLAND and **PEREZ & LEHMAN** for Hunt.

BEARD, J. The complainants are the owners of the south part of lot 237, on Main Street, in Memphis, while the defendants, Mrs. Hunt and Mrs. Phelan, are owners of the northern part of the same lot, and both parties trace their titles back to a common source—one W. B. Greenlaw. The original deed from Greenlaw, under which complainants claim, was made on January 7, 1851, and described the lot now owned by them in these words: “Beginning on Main Street (the east side of Main Street at the southwest corner of the lot 237), running thence east 100 feet on a line parallel with Main Street to — foot alley; thence north with said alley 24 feet 9 inches to a stake (the above men-

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tioned alley shall be perpetually kept open to Monroe Street for common use); thence with a line parallel with Monroe Street west 100 feet to the east side of Main Street, 24 feet 9 inches to the beginning, this lot being the south portion of the subdivision of lot No. 237, as aforesaid."

A few months thereafter Greenlaw conveyed the remainder of lot 237 to the predecessor in title of the defendants, describing it as having a front on Main Street, and running back 100 feet. The title to this portion of that lot passed through various intervening conveyances until it was lodged, in the year 1857, in W. R. Hunt. In all these conveyances, the description of this lot carried it back to this private alley. In 1859, W. B. Greenlaw, for the recited consideration of five dollars, deeded this alley to Hunt, and, in 1865, he conveyed to his wife, Mrs. Hunt, one of the defendants, his entire holdings in lot 237, describing them as having a front on Main Street of $49\frac{1}{2}$ feet, running eastward 108 feet, thus embracing therein this alley. Mrs. Hunt and her co-respondent, Mrs. Phelan, are now the owners of this property.

The bill in this case avers that these defendants, with their lessee, Loeb, have very recently erected across this alley a solid brick wall, and a gate at the entrance to the alley, so as to prevent complainants from passing from the rear of their lot, over the alley, to Monroe Street, and the purpose and

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prayer of the bill is to compel, through proper decree, a removal of this wall and gate.

No question is, or on this record could be, made as to the creation of an easement in the strip of land described in Greenlaw's deed by the stipulation already set out, but relief is resisted by the defendants on the ground that complainants and their privies in estate, abandoned this easement in 1859, and that the defendants, and those from whom they claim, have been in open, exclusive, and adverse possession of that part of the alley in the rear of their lot since 1859, so that the easement now claimed by complainants has been long since extinguished.

Before coming to the discussion of the issues made by this defense, it is not improper to advert to certain well-established principles of the law of easement, which may assist in their determination. In the first place, there can be no doubt that, by the stipulation in question, the easement thereby created was appurtenant to the lot then conveyed, and that, with regard to the strip of land thus set apart for an alley, a servitude was imposed upon it, and, as to it, Greenlaw's then vendee had the dominant and the vendor, Greenlaw, the servient estate. Wash. on Ease. & Serv., pp. 10, 11; *Crutchfield v. Car Works*, 8 Bax., 242; *Brew v. Van Deman*, 6 Heis., 433.

Again, there is as little doubt that this easement, so annexed to this lot, in the hands of Greenlaw's

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vendee, has passed as appurtenant to it, with the various transmutations of title, to the complainants as privies in estate of the first taker, and that the charge on the servient tenement has followed it into the hands of the defendants, Mrs. Phelan and Mrs. Hunt (*Hills v. Miller*, 3 Paige Chy. R., 254; Wash. on Ease. & Serv., 4th Ed., 34-37; *Crutchfield v. Car Works*, *supra*), unless it be that it has been extinguished, as is alleged by the defendants.

Further, mere nonuser will not amount to an abandonment which will impair or defeat an easement. The failure to use must be accompanied by some act of the owner of the dominant estate, clearly indicating his purpose to set up no further claim, in order to work abandonment. Wash. on Ease. & Serv., 707-717. And the cases, as well as text-books, concur in the proposition that this is true, especially as to easements created, as the one in controversy was, by grant. *Curran v. Louisville*, 83 Ky., 628; *Krecken v. Voltz*, 110 Ill., 264; *Wiggins v. McClary*, 49 N. Y., 348; *Bombaugh v. Miller*, 82 Pa. St., 208; 2 Wash. on Real Property, 312.

In *Dill v. Board of Education*, 47 N. J. Eq., 421 (S. C., 10 L. R. A., 276), it was held that nonuse alone for any length of time will not extinguish an easement created by express grant, and that, to accomplish this result, there must be nonuse, accompanied by "some conduct on the part of the owner of the servient tenement adverse to and defiant of the easement, and the nonuse must be the

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result of it. In short, it must amount to an acquiescence of twenty years in the acts of the owner of the servient tenement hostile to and intended to prevent it," and such is the holding of many of the best authorities.

In *Riddle v. Heulings*, 38 N. J. Eq., 20, Chancellor Runyon said: "A right of way cannot be released, abandoned, or surrendered by a mere parol agreement. The right in this case is the privilege of the use of a lane or passageway of twelve feet wide. It was granted, in connection with the conveyance of the lot (by the same deed), for use in connection with the lot and for the convenience of the owners thereof. If the fact were that the land or passageway has not been used for the last twenty-seven years, except by express permission from the defendant or his father, it would not bar the complainant from a right to relief. The right in question exists by grant, and nonuse alone will not forfeit or extinguish it."

But nonuser by the dominant owner, united with an adverse use of the servient estate for the period of twenty years, notoriously and clearly inconsistent with the continued existence of the easement, will extinguish it. *Dill v. Board of Education*, *supra*; *Jamison v. Walker*, 11 Gray, 423; *Smith v. Langwald*, 140 Mass., 205.

With these legal principles established, we will turn to the facts on which these defendants seek to repel the claim of the complainants.

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In 1859 Mr. Hunt erected a large block on his lot. The eastern or rear wall of this block was built up to the western line of the alley. It was, however, left as an open area. On one side of this area, a stairway was built by him to give access to the upper rooms of this building. This, however, did not interfere with its use as a passageway. Underneath he constructed a cellar 108 feet from front to rear, which was extended below and to the eastern margin of the alley, and at the same time he put up a gate at the mouth or Monroe Street entrance to the alley. This building was burned in 1862, and some time afterward there was erected by him upon its site some cheap structures, which ran back 100 feet, having the same open way in the rear, which, as formerly, was closed by a gate erected at the line of Monroe Street. This gate stood there for some time, when, according to Mrs. Hunt's testimony, it was taken down, and the inclosure was boarded up entirely. This condition existed until 1866, as stated by this witness, when, upon the solicitation of one Mrs. Valentine, whose husband, she says, occupied the lower part of the Robinson house as a store, the latter was permitted to put a door at the entrance from Monroe Street, upon the condition that he should keep it locked, and use the area alone for the benefit of his friends and business. She further states that her husband soon became dissatisfied with this arrangement, and he again closed up this entrance, and it so remained

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until the year 1873, when, upon a contract with herself as the owner of the property, Mr. Luerhman, who occupied a house on the eastern side of the alley, placed a gate at the entrance, and, for the use of the alley, paid a nominal rent. In 1882 Mrs. Hunt leased to Luerhman $49\frac{1}{2}$ by 100 feet of her property, and he erected a one-story building upon it. This lease did not include the alley, as Mrs. Hunt says she desired that left open for light and air, but the north wall of the building extended across the alley, having, however, an opening or doorway into this area. In 1887 Mrs. Hunt gave Luerhman a new lease, covering a period of ten years from that date, and then he erected, upon the walls of his original structure, four more stories, the second story extending over this area, but leaving it open beneath. In this area he erected a stairway for the use of his building, and at its entrance, as before, a gate or door for access to and egress from it. In 1893 this building was destroyed by fire, when the property was improved by Mrs. Hunt and Mrs. Phelan, and leased to their co-defendant, Loeb. After getting possession he erected a solid brick wall across the alley, and thus cut off complainants from all that part of it in the rear of the Hunt and Phelan tenement. It is this wall that has occasioned the present controversy.

It is clear that neither the extension of the Hunt cellar underneath this alley nor the construction of the rooms above it possess any significance, so far

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as the issue here presented is concerned, for neither of these improvements interfered with the easement of passage from the Robinson house to Monroe Street. And we think the defendants attach undue importance to the gates and doors, which were put up and maintained, according to Mrs. Hunt, during the greater part of the time by Col. Hunt and his privies in estate at the entrance to this alley. For even if it be true that these parties by these acts intended to assert an independent and exclusive right to the alley, yet it does not follow, as a matter of law, that the easement therein of complainants, and those from whom they claim, would be affected thereby. Nor does it any the more follow that an assertion of control, as against Luerhman or any other stranger in interest, would impair it. Such a result would only be consequent upon an adverse, exclusive claim set up in connection with these obstructions, of which the owners of the easement had notice. These gates and doors might have stood for an indefinite time, and the defendants might have asserted to others their exclusive claim, yet if they did not make it known to those entitled to the easement as an appurtenant to their estate, by debarring them from its enjoyment or otherwise asserting such adverse right, they would not be affected by it. The mere maintenance of these gates and doors was not inconsistent with the rights of these parties. They might well assume that they were erected to prevent intrusion into the alley and in

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the interest of all, to secure it from the commission of nuisances by outsiders. As was said by Chief Justice Gibson, in *Nitzell v. Paschall*, 3 Rawle, 76, in such a case there must be a denial of the title, or other act on the adverse part, to quicken the owner in the assertion of his right.

In *Welsh v. Taylor*, New York Court of Appeals, 18 L. R. A., 535, the same contention was made as to the effect of the erection of a gate by one owner of an easement of way through an alley upon the right of another entitled to a like easement through the same alley. The Court then said: "The fact of the existence of a gate is of no importance in the case as evidence of abandonment, in the absence of evidence that it was used to exclude the owner of the adjoining property. It is not denied that no use was made of the alley by the owner of 143, and as long as there was no occasion on their part to use it, the mere existence of a gate was not notice of any adverse claim on the part of their co-tenants. Nor would acquiescence in its existence be prejudicial to their rights unless an adverse claim was brought to their knowledge. So long as it did not hinder, obstruct or annoy others legally privileged to pass through the same, it was not in violation of the terms upon which the easement was granted."

Another case asserting the same view is that of *Barnes v. Lloyd*, 112 Mass., 224. There the defendant claimed a right of way over the plaintiff's

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land, each having title to his property from the same party, who, in his deed to the grantee of defendant had expressly granted a right of way over the lot which, through subsequent conveyances, passed to the plaintiff. All the conveyances of the plaintiff's lot down to 1859 had in them this reservation. For a term of seventy years from the grant of the easement and for a period of twenty years "from its last recognition by the owner of the servient tenement, no use whatever of the right of way had been made by the successive owners of the defendant's lot, and plaintiff's lot had always been kept fenced, both on its road side and on the line with defendant's lot, and also across the middle by fences, without any gateway or barway or other opening, and the lot itself had been continuously cultivated. The jury found, nevertheless, that there had not been such adverse use as to extinguish the easement, and the Court held that mere nonuser, under the circumstances, did not extinguish it."

Authorities to like effect could easily be multiplied, but it is sufficient for our purpose to refer to only one more—that of *Railroad v. French*, 100 Tenn., 209—where the principle underlying these cases was applied for the preservation of the charter easement for right of way of a railroad over one hundred feet on each side of the center of the track, as against a party claiming under a deed to the fee and actual occupancy for over seven years by his vendor of an original tract of which this lot formed a part.

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Turning to the record, we think the evidence is overwhelming that there was no abandonment by the complainants, or of those through whom they claim, of this right of way, nor adverse holding so as to extinguish it.

What was the extent of the authority over this alley exercised by Mr. Hunt from 1859, when he took his deed for it from Greenlaw, until his death in 1872, only appears from the testimony of Mrs. Hunt, and while she stated that during that period of time Mr. Hunt, for himself and her, asserted through the visible evidences of gates, etc., an exclusive claim to this alley, yet it is manifest this statement is of little value, in view of her admission that up to her husband's death she had not looked after anything connected "with the holding, improvements, or renting out of the property," or "its management." In fact, the testimony of Mr. Jones, a property owner in the immediate vicinity of this alley, would rather repel the suggestion that Mr. Hunt acquired title to it in order to set up a claim against the parties interested in common with himself in this easement. This witness says he was present on one occasion when Col. Hunt was complaining to Greenlaw about the nuisances the tenants across the alley from him were constantly committing on it, and that Greenlaw then proposed to convey it to him, to better protect himself against said offenders, and that he did then execute the deed of 1859. We think it fairly inferable from this that

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this was his sole purpose in taking this deed and in the erection and maintenance of the gate at the entrance of the alley.

It is true Mrs. Hunt says that while one Valentine occupied the Robinson property as a business house, she, at the solicitation of Mrs. Valentine, obtained her husband's permission for the Valentines to use this alley. In this she is corroborated by one Emma Chalmers, a colored nurse. Both these witnesses place this circumstance in 1866. They were certainly mistaken at least as to the year of its occurrence, as Mrs. Valentine fixes her marriage in 1869, and she denies the occurrence altogether, and says, with great positiveness, that from her marriage she and her husband occupied this property for living and business purposes until his death, in 1879, and during this period without let or hindrance, as well as without permission, from the Hunts, continually using the alley for themselves, their employes, and also in passing their merchandise. From 1873 until 1893, when the Robinson house was burned by the same fire which consumed the Luerhman structure, the evidence is practically without contradiction that the tenants of the Robinson building made daily use of this alley as a matter of right, and without molestation from or submission to these defendants.

But it is insisted that John B. Robinson, at one time an owner of the lot now the property of the complainants, extended a wall on a line with the

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north wall of his building, across this alley, and thus clearly indicated his purpose to abandon all right of easement in the remainder. In the first place, Mr. Robinson parted with his interest in this property in 1859, by a deed conveying it to his wife for life, and at her death to such of her children as then survived her. It is evident that this wall was built long after that year, and when he was managing it for minor remaindermen, whose interest he could not prejudice by any such personal action. But an equally conclusive answer to this insistence is that he constructed a door in this wall, which gave him and the occupants of the building easy access to and from the passageway to Monroe Street.

We have examined the case of *Monaghan v. Memphis Fair Co.*, 11 Pickle, 108, and we find that it has no bearing on this controversy.

After a careful consideration of the whole record, we are entirely satisfied that the easement of right of way through this alley, appurtenant to the lot of the complainants, has neither been abandoned nor lost by reason of adverse holding, and the obstructions placed in it by defendant, Loeb, with the consent of his co-defendants, are unwarranted.

The decree of the Chancellor, therefore, will be reversed and a decree will be entered here for the abatement of this obstruction, and perpetually enjoining the defendants from interfering with the use by complainants and their tenants of this alley.

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McCULLY *v.* STATE.

(*Jackson.* August 29, 1899.)

FROM HENDERSON.

Appeal in error from the Criminal Court of Henderson County. JNO. M. TAYLOR, J.

AND

THORNTON *v.* STATE.

(*Jackson.* August 29, 1899.)

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby County. L. H. ESTES, J.

L. B. MCFARLAND, S. J. SHEPHERD, A. B. PITTMAN, JOHN C. MYERS, E. L. BULLOCK, C. G. BOND,

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W. G. TIMBERLAKE, W. M. TAYLOR, McCALL & LANCASTER, F. M. DAVIS, and D. E. SCOTT for the Judges.

Attorney-general PICKLE, H. D. MINOR, and BARHAM & TIMBERLAKE *contra*.

1. JUDGES. *Removal of, by concurrent resolution.*

The removal of a Judge by concurrent vote of the two houses of the General Assembly, as authorized by Art. VI., Sec. 6, of the Constitution, cannot be justified or sustained where the resolution of removal negatives the existence of any cause of removal personal to the Judge or affecting the administration of his office, and recites as the sole cause for his removal a superfluity of Judges, and the necessity to reduce their number and judicial expenses to subserve the public welfare. The removal contemplated by the provision is for "cause" affecting the official personally or the administration of his office, to be effected after notice and trial. (*Post*, pp. 512-531.)

Constitution construed: Art. VI., Sec. 6.

Acts construed: Acts 1899, Chs. 64, 155.

Cases cited: *Hawkins v. Kercheval*, 10 Lea, 535; 72 N. Y., 449; 39 N. J. L., 14; 1 Burr, 517; 57 Mo. App., 203.

2. COURTS. *Abolition of circuits and chancery divisions.*

It is the law of this State, established by repeated adjudications, that the Legislature has the constitutional power to abolish a circuit or chancery division and reassign the counties composing it, and thereby deprive the incumbent Judge or Chancellor of his official character and powers, and of his right to draw a salary from the State. (*Post*, pp. 531-575.)

Constitution construed: Article VI., Secs. 1, 4, 7.

Act construed: Acts 1899, Chs. 64, 155.

Cases cited and approved: *State, ex rel., v. Campbell*, 3 Shan., 335; *Halsey v. Gaines*, 2 Lea, 316; *State v. McConnell*, 3 Lea, 332; *State v. Algood*, 87 Tenn., 163; 30 L. R. A., 153; 30 Ark., 566; 72 Iowa, 401.

Cited and distinguished: *State v. Leonard*, 86 Tenn., 485; *Keys v. Mason*, 3 Sneed, 6; *Cross and Mercer, ex parte*, 16 Lea, 489; *Powers v. Hurst*, 2 Hum., 24; *Pope v. Phifer*, 3 Heis., 682; *State v. Cummings*, 98 Tenn., 667; *State v. Glenn*, 7 Heis.,

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472; *Normant v. Smith*, 5 Yer., 270; *Venable v. Curd*, 2 Head, 586; *Brewer v. Davis*, 9 Hum., 208; *State v. McKee*, 8 Lea, 24.

3. CONSTITUTIONAL LAW. *Use of journal in construing Constitution.*

While the proceedings of a Constitutional Convention may be properly looked to, and are of value in ascertaining the mischief designed to be remedied and the purpose sought to be accomplished by a particular provision, still, if the meaning of the language used is clear, it must be assumed that the Constitution was adopted by the people in its obvious sense, and not as having some other secret or abstruse meaning, deducible alone from the proceedings of the Convention. (*Post*, pp. 518-521.)

Case cited and approved: *State v. Wilson*, 12 Lea, 259.

4. SAME. *Stare decisis in construction of.*

The rule of *stare decisis* applies with peculiar force in the construction of Constitutions. "A principal share of the benefit expected from written Constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion." (*Post*, p. 533.)

5. SAME. *Legislative authority.*

The Constitution invests the General Assembly with legislative authority in general terms, and it is a well-settled rule of construction that a State Legislature, in its sphere of legislative action, has unlimited power, except so far as restrained by the Constitution of the State or the United States. (*Post*, pp. 549, 550.)

Case cited and approved: *Henley v. State*, 98 Tenn., 665.

6. SAME. *Constitutional provision violated by a statute must be pointed out.*

It is a familiar rule that a statute will not be annulled as in conflict with the Constitution unless its assailant can put his finger on the specific provision of the Constitution that the statute expressly, or by unavoidable implication, contravenes. (*Post*, pp. 550, 551.)

Case cited and approved: *Henley v. State*, 98 Tenn., 665.

7. SAME. *Statute not declared unconstitutional, when.*

The wisdom, policy, and desirability of statutes are matters addressed to the intelligence, patriotism, and discretion of the General Assembly. Hence a statute will not be annulled as

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unconstitutional because it may be supposed to violate the best policy, or some natural equity, or to interfere with the rights of freemen, or upon the idea that it is opposed to some spirit of the Constitution not expressed in its words, or because it may be supposed to be contrary to the genius of a free people. (*Post*, p. 551.)

Case cited and approved: *Henley v. State*, 98 Tenn., 665.

McALISTER, J. The plaintiff in error, McCully, was convicted in the Criminal Court of Henderson County of the offense of selling liquor to a minor, and from said judgment has appealed in error.

The main assignment arises upon the action of the trial Judge in overruling the defendant's plea to the jurisdiction of the Court. The plea averred that the Hon. John M. Taylor, who was assuming to preside and hold said Court, was not Judge of the Criminal Court of the Eleventh Judicial Circuit, nor Judge of any Court in the State of Tennessee, for the reason that, on April 20, 1899, the General Assembly of the State of Tennessee adopted a resolution, two-thirds of the members of each branch concurring, which resolution was, on April 21, 1899, approved by the Governor, removing the Hon. John M. Taylor from said office, in accordance with the authority conferred by Section 6, Article VI., State Constitution. The plea then recites the proceedings of the Legislature which resulted in the removal of Judge Taylor.

The cause for removal recited in the resolution, is that there is not sufficient business to require or justify the retention in office of said official, and

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that it is necessary for the welfare of the State that the judicial circuits and chancery divisions should be redistricted, and that there should be a reduction in the number of Circuit Judges, Chancellors, and Attorneys-general, to the end that there may be a reduction in the judicial expenses of the State and for the promotion of economy in the administration of public justice. No reason personal to the Judge was assigned as cause for removal, but, on the contrary, the resolution contains a testimonial to the "eminent ability, fidelity, and purity in public and private life of said John M. Taylor."

The plea to the jurisdiction was, on motion of the Attorney-General, stricken from the files, and thereupon the defendant was placed on trial, convicted by a jury, and fined by the Court the sum of \$10. The verdict of the jury is fully supported by the evidence, and the only question presented for our determination upon the record is whether the Court had jurisdiction of the case.

It should be remarked that, prior to the adoption of the removal resolution, the General Assembly had passed an Act repealing the Act creating the Criminal Court of the Eleventh Judicial Circuit and abolishing said Court, but the repealing Act was expressly limited not to take effect until the expiration of thirty days from the final adjournment.

At the time the case now under consideration was tried in the lower Court, to wit, on May 7, 1899, the abolishing and repealing Act, approved

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April 6, 1899, had not taken effect, and hence no question is presented upon this record in respect of the right of the Legislature to abolish the Court. It is further to be observed that when the removal resolution was approved, to wit, on April 21, 1899, the abolishing and repealing Act had not taken effect. That Act, as already stated, did not take effect until thirty days after the final adjournment of the Legislature. Precisely formulated, then, the question for our determination, upon this record, is whether, upon a proper construction of Art. VI., Sec. 6, of the State Constitution, the Legislature is empowered, for economic reasons, to remove a Judge whose office is still in existence. If the Act abolishing the Court had already taken effect, and afterwards the removal resolution had been adopted, a different question would arise. In such case the whole question would turn upon the power of the Legislature to abolish the Court, for if such power existed the Judge would thereby be displaced, and a removal resolution would be useless and supererogant. It would seem a legislative solecism to remove a Judge from an office which had already been abolished and had no existence. The present case, however, must be adjudged upon the state of the law as it stood at the date of the trial below, and, as we have already seen, the Act abolishing the Court had not then taken effect, and the jurisdiction of the Judge was challenged alone upon the ground of his removal from office.

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The question, then, is whether the Legislature is clothed with authority, under the Constitution, to remove a Judge from office for economic reasons purely. The authority is claimed to be derived from Art. VI., Sec. 6, Constitution of 1870, which provides, viz.: "Judges and Attorneys for the State may be removed from office by a concurrent vote of both houses of the General Assembly, each house voting separately, but two-thirds of the members to which each house may be entitled must concur in such vote. The vote shall be determined by ayes and noes, and the names of the members voting for or against the Judge or attorney for the State, together with the cause or causes of removal, shall be entered on the journal of each house, respectively. The Judge or attorney for the State, against whom the Legislature may be about to proceed, shall receive notice thereof, accompanied with copy of causes alleged for his removal, at least ten days before the day on which either house of the General Assembly shall act thereupon."

Article V., Sec. 4, provides for impeachment of Judges for crimes committed in their official capacity. In support of the action of the General Assembly, it is insisted by the Attorney-general (1) that, under this article and section of the Constitution, Judges and Attorneys-general may be summarily removed for any cause that the two houses of the General Assembly may deem sufficient; (2) that the two houses are exclusive and final Judges of the sufficiency of the

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cause for removal, and the Courts cannot revise or annul their action; (3) that it is a sufficient cause for removal that an office is useless and the salary an unnecessary public burden. These propositions, thus formulated by the Attorney-general, have been reinforced with an argument evincing much ability and research. Antagonizing the views of the Attorney-general, it is insisted that the Legislature had no power, under Art. VI., Sec. 6, of the Constitution, to remove a Judge, excepting for causes personal to the Judge, or his administration of the office, and that the removal of a Judge upon economic grounds is void. It is insisted that the removal clause of the Constitution was designed to cover cases of incompetency, mental or physical disability, continued neglect of official duty, misconduct in office, or other causes which would not constitute impeachable crimes, but would, nevertheless, be proper grounds for removal. It is further insisted that if the theory of the State is sound, the constitutional tenure of office is subject to abbreviation or destruction at the will of two-thirds of the members of the Legislature, exercised for any cause they may deem sufficient for removal, whether founded on economy, politics, religion, race, policy, or expediency, thus discrowning absolutely the independence of the judiciary. On the other hand, in support of the contention that the power of removal is unlimited, it is shown from the journal of the Constitutional Convention of 1870 that three amendments, defining and limiting the

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authority conferred by this section, were successively defeated.

First, Mr. Gibson proposed an amendment to define and limit the power of removal in these words—"for crime, corruption, habitual drunkenness, incompetency, or neglect of duty."

Second, Mr. Fentress offered, in lieu of Mr. Gibson's amendment, the following—"for official corruption or for continued neglect of duty or continued incapacity of any kind to perform the duties of his office."

Third, Mr. Turner proposed the following amendment—"provided the causes of removal are such as are prescribed by the general law of the land, passed by a Legislature prior to the one taking action thereon."

But the convention rejected all of these amendments, and adopted the section substantially as it stood in the Constitution of 1834. It is now asked if this Court will undertake to do what the convention so emphatically refused to do—instruct the Legislature for what causes removal can lawfully be had.

It is insisted that if the convention was willing to leave the matter to unlimited legislative discretion, this Court cannot inquire into the sufficiency of the cause of removal or the regularity of the proceedings. It is insisted the Courts can no more inquire into the existence and sufficiency of the causes or reasons that prompted the Legislature to

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adopt a removal resolution than they can inquire into the reasons for the passage of statutes, or the levy of taxes or the appropriation of money. It is insisted the power of removal, as therein declared, is absolute and unconditional, and that the language indicates that the whole matter was left to legislative discretion.

We cannot concur in this construction of the removal clause of the Constitution. The fact that several amendments, specifying the particular causes for which the Legislature would be authorized to remove, were successively rejected, does not, in our judgment, demonstrate that the convention thereby intended to invest the Legislature with an unlimited power of removal. As well said by able counsel: "The authors of these amendments may have believed it best to put beyond any question that the cause of removal should be confined to the official or personal conduct of the Judge, and that this desire was met by the counter opinion that no other construction than this could be placed upon the removal section, and that, therefore, the amendments were needless and superfluous. . . .

"Again, there is another reason showing it was judicious to reject said amendments. Causes personal to the incumbent or relating to the conduct of his office might assume many phases, and, therefore, it would be unwise to undertake to define the same. The enumeration of certain causes should have excluded any legislative power to act upon other causes

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not expressly designated. An examination of the causes of removal might partially defeat the object of the removal clause. For this reason it was judicious to use general terms, so as to include the intended causes of removal in all possible phases."

Mr. Cooley, in his works on Constitutional Limitations (2d Ed.), p. 65, says: "When the inquiry is directed to ascertaining the mischief designed to be remedied or the purpose sought to be accomplished by a particular provision, it may be proper to examine the proceedings of the convention which framed the instrument. Where the proceedings clearly point out the purpose of the provision, the aid will be valuable and satisfactory; but where the question is one of abstract meaning, it will be difficult to derive from this source much reliable assistance in interpretation. Every member of such a convention acts upon such motives and reasons as influence him personally, and the motions and debates do not necessarily indicate the purpose of a majority of the convention in adopting a particular clause. It is quite possible for a clause to appear so clear and unambiguous to the members of the convention as to require neither discussion nor illustration, and the few remarks made concerning it in the convention might have a plain tendency to lead directly away from the meaning in the minds of the majority. It is equally possible for a part of the members to accept a clause in one sense and a part in another. And even if we were certain we had attained the

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meaning of the convention, it is by no means to be allowed a controlling force, especially if that meaning appears not to be the one which the words would most naturally and obviously convey. For, as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument on the belief that that was the sense designed to be conveyed. These proceedings (the journal) are less conclusive of the proper construction of the instrument than are legislative proceedings of the proper construction of a statute, since in the latter case it is the intent of the Legislature we seek, while in the former we are endeavoring to arrive at the intent of the people through the discussions and deliberations of their representatives." We have an illustration of this in the adoption by the convention of 1870 of that clause which provides, viz., "No corporation shall be created or its powers increased or diminished by special laws," etc. The journal of the convention shows that an amendment to limit the provisions of this section to private corporations and exclude municipal corporations was rejected. Yet this Court held that, looking to the scope and purpose of the entire section, private corporations were

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alone contemplated, and the clause did not apply to municipal corporations. *State v. Wilson*, 12 Lea, 259.

We think any plain man looking at the force of this removal clause, and reading therein that the cause or causes of removal shall be entered on the journal of each house respectively, and that the Judge against whom the Legislature may be about to proceed shall receive notice thereof, together with a copy of the causes preferred for his removal, at least ten days before the day on which either house of the General Assembly shall act thereon, would say at once that the clause in question contemplated an investigation of some cause touching the personal or official conduct of the Judge. If the power of removal is unlimited, why provide for service upon the Judge of a copy of the causes alleged for removal at least ten days before action, unless it was to give him an opportunity to prepare for trial, and why provide for a trial of an economic question? This would present a curious anomaly in legislative proceedings—a trial of an issue to determine whether the services of the Judge are needed. In our opinion, if economic reasons had been in the minds of the framers of the Constitution, other words than a removal for “cause” and on notice would have been used. The word cause used in the removal clause means legal cause. It contemplates a charge, a trial, and a judgment of removal upon cause. *State v. Hewitt*, 44 Am. St. Repts., 793, 794.

In the case of the *State v. The City of Duluth*,

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39 Am. St. Repts., 596, 598, the validity of an official removal was involved. The city ordinance provided "that any member may be removed by a vote of two-thirds of all members of the Council, for sufficient cause, on charges and notice." The Court said, viz.: "Cause or sufficient cause means legal cause, and not any cause which the Council may think sufficient. The case must be one which specially relates to and affects the administration of the office, and must be restricted to something of a substantial nature, distinctly affecting the rights and interests of the public. The cause must be one touching the qualifications of the officer or the performance of his duties, showing that he is not a fit or proper person to hold the office. An attempt to remove an officer for any cause not affecting his competency or fitness, would be an excess of power and equivalent to an arbitrary removal. In the absence of any statutory specification, the sufficiency of the cause should be determined with reference to the character of the office and qualifications necessary to fill it." *Hawkins v. Kercheval*, 10 Lea, 535.

Where the removal is to be made for cause on notice, and no specific cause is defined, the cause of removal is to be construed as relating to the person of the official and his administration of the office. See Throop Pub., Sec. 367; 1 Dillon (3d Ed.), Sec. 251.

"Removal for cause" is defined in Anderson's Law Dictionary as follows: "Removal for cause im-

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ports that a reason exists, personal to the individual, which the law and sound public opinion recognize as good cause for his no longer occupying the place. Implies some dereliction or general neglect of duty, some incapacity to perform the duties of the post, or some delinquency affecting the incumbent's general character or fitness for office. The power to remove an officer 'for cause' can be executed only for just causes after he has had an opportunity to defend." The following authorities are cited to support definition: *People v. Nichols*, 19 Hun, 448 (1879); *People v. Fire Coms.*, 72 N. Y., 449; *Haight v. Dove*, 39 N. J. L., 14; *Rex v. Richardson*, 1 Burr, 517.

"Where an officer is appointed or elected for a definite term, he cannot be removed but for cause, by which is meant charges, notice, and trial." 57 Mo. App., 203.

"The statute of New York confers upon commissioners of New York city the right to remove certain officers at pleasure, with this limitation—that such power of removal "cannot be exercised in respect to any regular clerk or head of a bureau until he has been informed of the cause of the proposed removal, and has had an opportunity of making an explanation." It also provides that a record of the true causes of removal shall be entered of record in the department, and a statement thereof shall be filed. Under this authority, the commissioners undertook to remove a certain officer who

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came within the provisions above set out, and the Court of Appeals of New York, through Allen, J., said: "The party against whom the proceeding is taken must be informed of the cause of the proposed removal, and be allowed an opportunity of explanation. This necessarily implies that the cause must be some dereliction or general neglect of duty, or incapacity to perform the duties, or some delinquency affecting his general character and his fitness for the office. The cause assigned should be personal to himself and implying an unfitness for the place." *People v. Fire Commissioners*, 72 N. Y., 448, 449.

Another Act of the Legislature confers the following power: "The heads of all departments, and all other persons whose appointment is in this section provided for, may be removed by the Mayor for cause, and after opportunity to be heard, subject, however, before such removal shall take effect, to the approval of the Governor, expressed in writing."

The Court, in reviewing a removal which had been made under above quoted power, said: "Before an officer can be removed thereunder, he must have definite and specific copy of charges, reasonable time to answer, the right to hear and examine the evidence against him, to offer testimony himself, and to have aid and advice of counsel during the conduct of the examination. The cause must be found in some act of commission or omission by the officer

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in regard to his duty or affecting his general character, which the law and a sound public opinion pronounce to be sufficient to justify a forfeiture by the officer having the power of removal. *People v. Nichols*, 19 Hun (N. Y.), 441 *et seq.* This case also explicitly recognizes the power of the judiciary to review the action of the Governor, as well as that of the Mayor in such matters. It also discusses at length the method of procedure which shall be followed in removing officers where a Constitution or act of the Legislature confers such power without prescribing the procedure, giving to the party whose rights are to be affected all the privileges he would have under the common law when his rights are sought to be interfered with." Other authorities on the point under discussion are: *Haight v. Love*, 39 N. J. L., 14; 32 Mich., 255; *Edison v. Hayden*, 20 Wis., 932; *State v. McCurry*, 21 Wis., 498; *State v. Waterton*, 9 Wis., 271.

In the last case above cited, the following language is used: "What is 'due cause' for the removal of an officer is a question of law to be determined by the judicial department, and in the absence of statutory provision as to what shall constitute such cause, should be determined with reference to the nature and character of the office and qualifications necessary to fill it."

Removal for personal causes seems also to have been the construction of this clause by an eminent

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member of the convention, who was afterward Attorney-general of the State, and who argued the case of *Coleman, ex rel., v. Campbell*, decided by this Court in 1875, reported in 3d Shannon's Tennessee Cases. In his brief, still on file in that case, he said, viz.: "Here we have the Constitution with express provisions for the independence of the judiciary. What are those provisions? (1) A fixed salary; (2) a permanent Supreme Court, not subject to interference by legislative action, independence in the highest degree in the Court of last resort; (3) exemption from removal from office for personal reasons, except by a two-thirds vote of both houses." He further says: "The Constitution itself provides for the removal of Judges on personal grounds, but it throws restrictions around these by requiring a two-thirds vote. It also, in one view, provides for the destruction of the Courts (inferior Courts), but as this involves not personal consideration merely but general matters of public policy, as it involves the interests of the people, their rights to their Courts or their support of the burden of them, it no longer throws this protection, which a man unsupported requires, but trusts him to the common cause he makes with his people."

While this section of the Constitution was not necessarily involved, and hence was not construed by the majority of the Court in *Coleman v. Campbell*, 3 Shannon, 355, nor in *Halsey v. Gaines*, 2 Lea, yet Judge Freeman, in his dissenting opinions in

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those cases, expressed his views of the meaning of this section. In the former case he said, viz.: "The other mode is found in Art. VI., Sec. 6, which provides for removal by a concurrent vote of both houses, each house voting separately; two-thirds of the members to which each house may be entitled must concur in this vote. This is not based on crime in his official capacity (as provided in cases of impeachment), but the right may be exercised for other causes, but not, we take it, without causes or at arbitrary discretion of the body, for it is provided the cause or causes of removal shall be entered on the journal of each house, respectively." Again, he says: "In any case for removal the mode by which it shall be done is definitely pointed out in the Constitution, with its proper safeguards and restrictions, involving a trial or hearing, and the principle of responsibility on the Legislature for the act, as a check upon improper action." Similar views are expressed by Judge Freeman in his dissent in *Halsey v. Gaines*, 2 Lea.

The General Assembly, in the removal of Judge Taylor, proceeded upon the idea set forth in the report of the Redistricting Committee, that the proceeding was not, in its opinion, a proper case to be submitted on proof, and that the matter was not susceptible of proof, and was a question which addressed itself to the judgment of the Legislature, and the Judge had no constitutional right to be heard.

We entirely agree that if the Legislature had the

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right to remove the Judge upon economic grounds, then an issue and trial to determine whether the State needed the services of the Judge would have been absurd. Questions of policy and economy are matters addressed exclusively to the lawmaking power, and it would seem ridiculous to argue that the Judge is guaranteed a constitutional right to be heard on such a subject. But it is very plain that this section of the Constitution does guarantee him a right to be heard on the particular cause alleged for removal, and an opportunity to defend himself against the attack, by requiring at least ten days' notice of the intended action, with a copy of the cause assigned for removal. It is very evident that economic reasons could not have been within the contemplation of the Legislature, and the cause of removal must relate to the personal conduct of the Judge or his administration of the office. Again, if the power of removal conferred by this section is arbitrary and unlimited, a Judge might be removed on account of his religion, his politics, his race, or because he had declared unconstitutional a particular enactment of the Legislature. Such a construction would be monstrous, and wholly abhorrent to fundamental ideas of justice and judicial independence. The design of the framers of the Constitution was to create three departments, executive, legislative, and judicial, which should be co-ordinate and wholly independent in the exercise of their appropriate functions. "The Legislature, though

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possessing a larger share of power, no more represents the sovereignty of the people than either of the other departments. It derives its authority from the same high source." *Bailey v. Philadelphia R. Co.*, 4 Harr, 402; *Whittington v. Polk*, 1 H. & J., 244. Said Thomas T. Marshall, viz.: "We have incorporated certain permanent and eternal principles in written constitutions, and erected an independent judiciary as the depository and interpreter, the guardian and the priest of these articles of freedom." It has been said that of all the contrivances of human wisdom this invention of an independent judiciary affords the surest guarantee and the amplest safeguard to personal liberty and the rights of individuals.

If the Legislature has such power as is contended for in the construction of this clause of the Constitution, the judiciary would no longer be an independent and co-ordinate branch of the government, but a mere servile dependency. But it is said, conceding the Legislature had no power to remove for the cause assigned, its action is nevertheless final and not subject to review by the judiciary. If this is so, the distribution of the powers of government and vesting their exercise in separate departments, would be an idle ceremony. It is very true that no department can control or dictate to another department when acting within its appropriate sphere. *People v. Bissell*, 68 Am. Dec., 591; *Wright v. Wright*, 56 Am. Dec., 723.

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Each department has exclusive cognizance of the matters within its respective jurisdiction, and when acting within the authority of each, its action must be final and supreme. 6 Am. & Eng. Enc. L., 1008, note.

These principles are axiomatic, and need no citation of authority to support them, but the question remains, Who is to decide when a particular department is acting within the sphere of its authority? Mr. Webster, in his great speech on the independence of the judiciary, said, viz.: "The Constitution being the supreme law, it follows, of course, that any act of the Legislature contrary to that law must be void. But who shall decide this question? Shall the Legislature itself decide it? If so, then the Constitution ceases to be a legal, and becomes only a moral, restraint upon the Legislature. If they, and they only, are to judge whether their acts be conformable to the Constitution, then the Constitution is admonitory and advisory only, and not legally binding, because, if the construction of it rests wholly with them, then discretion in particular cases may be in favor of very dangerous and erroneous constructions. Hence the Courts of Law necessarily, when the case arises, must decide on the validity of particular acts."

We are constrained, therefore, to hold that the Legislature, in removing Judge Taylor from office for the reason assigned, transcended its constitutional authority, and such action is therefore void.

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Chief Justice Snodgrass, Judges Caldwell and Beard concur, Judge Wilkes dissents.

It is insisted, however, that the General Assembly, by an Act passed at the same session—to wit, April 6, 1899—abolished the Criminal Court of the Eleventh Judicial Circuit, and repealed the Act of 1895, which created the same. As already observed, this Act did not take effect until thirty days after the adjournment of the Legislature, and it had not taken effect at the date of the proceedings in this case, nor at the date of the adoption of the removal resolution herein discussed. The question, then, of the abolition of the Court does not arise on this record. But since counsel have presented the question and earnestly ask the Court's opinion touching it, thereby to avoid further litigation, we proceed to express our views. The Act creating the Criminal Court of the Eleventh Judicial Circuit was passed in 1895. That Act was repealed by an Act passed April 6, 1899, and the Criminal Court of the Eleventh Judicial Circuit was abolished. The Act provided that it should take effect thirty days from and after the final adjournment of the General Assembly. At the same session another bill was passed providing that the jurisdiction of said Criminal Circuit should be exercised by the Circuit Courts of said counties. Said Act also detached Benton County from the Eleventh Judicial Civil Circuit and attached it to the Twelfth Circuit. It was further provided that the Judge of the Eleventh

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Civil Judicial Circuit should have civil jurisdiction in Madison County, and then enacted, viz.: "And the said county of Madison is hereby attached to and also made a part of the Eighteenth Judicial Circuit of the State, and the Judge of said Circuit shall have exclusive general common law and statutory jurisdiction in all cases of a criminal character arising in said county of Madison, but shall have no civil jurisdiction whatever." Said bill further provided, viz.: "That no case, proceeding or process shall abate by reason of any of the changes hereinbefore made," etc. This Act also provided that it should take effect thirty days after the final adjournment of the Legislature.

First, it is insisted by learned counsel representing Judge Taylor that the Act of 1899, repealing the Act of 1895, which created the Eleventh Judicial Criminal Circuit and abolished the Court, is unconstitutional and void.

We are constrained to hold, however, that this question is not *primæ impressionis* in this State, but has, on two occasions, been solemnly and deliberately determined by this Court contrariwise to the present contention. These adjudications have stood for a quarter of a century, and during that period the Legislature has repeatedly exercised the power to abolish Courts of its own creation and the power has been unchallenged. The rule of *stare decisis* is peculiarly applicable in the construction of written constitutions. Says Mr. Cooley, viz.: "A cardinal

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rule in dealing with written instruments is that they are to receive an unvarying interpretation, and that their practical construction is to be uniform. A Constitution is not to be made to mean one thing at one time and another at some subsequent time, when the circumstances may have so changed as, perhaps, to make a different rule in the case seem desirable. A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion." Constitutional Limitations (2d Ed.), star page, 52.

In the case of the *State, ex rel. Coleman, v. Campbell*, decided by this Court at Jackson, in 1875, reported in 3d Shannon's Tennessee Cases, 355, the question presented was in respect of the constitutionality of the Act of March 15, 1875, entitled "An Act to abolish the Second Circuit Court and the Second Chancery Court of Shelby County." The Constitution of 1870, Art. VI., Sec. 1, provides, viz.: "The judicial power of this State shall be vested in one Supreme Court, and in such Circuit, Chancery, and other inferior Courts as the Legislature may from time to time ordain and establish;" provides "that Judges of the Circuit and Chancery Courts, and other inferior Courts, shall be elected by the qualified voters of the district to which they are to be assigned. . . . His term of service shall be eight years." Section 7 provides, viz.: "The Judges of the Supreme and inferior Courts shall, at

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stated terms, receive a compensation for their services, to be ascertained by law, which shall not be increased or diminished during the time for which they are elected."

Construing these sections of the Constitution, this Court held: (1) That the Legislature has ~~the~~ constitutional power to abolish particular Circuit and Chancery Courts, and to require the papers and records therein to be transferred to other Courts, and the pending causes to be heard and determined in the Courts to which they are transferred. The power to ordain and establish from time to time Circuit and Chancery Courts includes the power to abolish existing Courts, and to increase and diminish the number. (2) The Judge's right to his full term and his full salary is not dependent alone upon his good conduct, but also upon the contingency that the Legislature may for the public good, in ordaining and establishing the Courts from time to time, consider his office unnecessary and abolish it. The exercise of this power by the Legislature is neither such as interferes with the independence of the Judge or with his tenure of office in such manner as can be complained of. When the Court or Courts over which a Judge presides is abolished, the office of the Judge is extinguished and his salary ceases. (3) It is provided there shall be but one Supreme Court; the number of its Judges is fixed and the places of its sessions are designated. These provisions show that it is the direct creature

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of the Constitution and subject to no invasion by the Legislature.

Judge Nicholson, among other things, said, viz.: "But it is not necessary that we should rely upon the authorities, conclusive as they are, to sustain the construction of the Constitution, so repeatedly acted upon by the Legislature, and so long acquiesced in by the people and the Courts. Upon a fair view of the subject intended to be accomplished, and the circumstances under which the language was used in the Constitution, we are of opinion it will properly bear the construction placed upon it by the Legislature. The object was to provide a system of inferior Courts, which would secure to all the people of the State the benefits of a sure and economical administration of justice through all time. The State was composed of many citizens, and its population and material interests subject to great changes. These fluctuations would necessarily require changes, from time to time, in any system of Courts that might be adopted. Hence it was not deemed proper by the Convention of 1870, to fix, permanently, by Constitutional recognition, the systems of inferior Courts then in operation, although they embrace the entire State. For the purpose of providing for future contingencies and exigencies, they were content to leave the ordaining and establishing of inferior Courts from time to time, to the discretion of the Legislature, with the single restriction as to continuance of the Circuit and Chancery Courts. It

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is legitimate business of the Legislature to determine how many Courts are necessary, and how the various circuits and districts should be arranged and formed. It was proper for the representatives of the people, session after session, to have the power to provide such changes in the circuits and districts, as should be shown by experience and observation to be necessary for the public good. This was the power conceded to the Legislature by the Convention when it was provided that they should ordain and establish such Circuit, Chancery, and other inferior Courts, as they should deem necessary from time to time. The ordaining and establishing of such Courts was to be the business of the Legislature through all time. It was impossible that the object to be accomplished could be effectuated by simply adding to the number of circuits or districts. Changes would or might become necessary, which involved the necessity of abolishing existing circuits or districts in ordaining and establishing others, or in reducing the number, if experience should prove that the public good required a reduction. The power to abolish for the purpose of effecting these objects was, therefore, necessarily implied. It was not intended that the power to abolish districts should be exercised with a view of depriving any portion of the people of Courts, but as a means of so ordaining and establishing the Courts as would better promote the public good. It is proper to add that any attempt of the Legislature to exercise this

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restricted power of abolishing existing Courts, for the purpose of depriving the people of the requisite number and character of Courts, would be an abuse of power which we have no right to anticipate, and which was not anticipated by the Constitution. Against such abuse of Legislative power the ballot box is the legitimate remedy."

It has no doubt been upon this view of the meaning of the power to "ordain and establish" Courts, that the various Acts of the Legislature have been passed, as well as the Act now under consideration, and we are satisfied that the construction so acted upon is correct.

We have not been able to discover in the Act in question the danger to the independence of the judicial department of the government which has been dwelt upon in argument with such earnest eloquence, nor do we see in it any evidence that the Legislature resorted to this as an indirect mode of removing obnoxious Judges. It appears to us to be the exercise of a legitimate power by the Legislature, under the conviction that two of the Courts in Memphis were unnecessary for the dispatch of the public business, and that, therefore, for the promotion of the public good they were abolished as useless, and their work assigned to two other existing Courts. We have no reason to suppose that the two Judges whose offices depended upon the continuance of the former law, were in any way obnoxious to the Legislature or the people, but were regarded as entirely

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worthy of their positions. The Act cannot, therefore, be regarded as an abuse of the power of removal for reasons personal to the judges, nor do we see how ~~the~~ danger of such an abuse of power hereafter could be in any way guarded against or prevented by that construction of the Constitution which would render the Act of the Legislature null and void.

We have not deemed it necessary to discuss the bearing upon the case of those clauses of the Constitution which provide for the salaries and the terms of service of the Judges, for the reason that we consider it too clear for argument, that if the law abolishing the Courts is valid, the offices and their incumbents, necessarily cease, and, of course, along with them, their salaries.

In our view of the Constitution, the Judge's right to his full term and his full salary is not dependent alone upon his good conduct, but also upon the contingency that the Legislature may, for the public good, in ordaining and establishing the Courts from time to time, consider his office unnecessary and abolish it. The exercise of this power by the Legislature is neither such as interferes with the independence of the Judge or with his tenure of office, as can be properly complained of. The power may possibly be exercised without good cause, but in such case the Courts can furnish no remedy.

The opinion in the case last cited was delivered by Chief Justice Nicholson, who was a member of

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the Constitutional Convention of 1870, and an active participant in its deliberations. Judge Freeman delivered an able dissenting opinion. These two opinions demonstrate that the questions now made against the validity of this legislation were presented and exhaustively considered by the Court. But ~~this is~~ not all. In 1879 this question was again elaborately considered by this Court in the case of *Halsey v. Gaines*, 2 Lea, 316, and the ruling in the Coleman case reaffirmed. Judge McFarland delivered the opinion of the Court in the Halsey case. In the latter case it appeared that Judge Halsey, whose Court had been abolished, had applied to the Comptroller for a warrant for his salary, insisting upon his right to have the same paid until the end of his term, notwithstanding his Court had been abolished. The warrant was refused, and thereupon proceedings were commenced by mandamus to enforce its payment. "Much of the argument," said Judge McFarland, "which has been pressed upon us in support of the claim, assumes that the former rulings of this Court as to the validity of the Act abolishing the Court is erroneous. . . . The Act was solemnly and in terms adjudged constitutional. It is true the relator was not a party to those proceedings, nor was he a necessary party. . . . The adjudication is nevertheless conclusive. . . . In this view it would seem unnecessary to re-examine the grounds of our former decision, but entertaining, as we do, no doubt of its correctness, we produce

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briefly the substance of the reasoning of Chief Justice Nicholson, to which we can add but little." Among other things Judge McFarland said, viz.: "But it is argued that although by the foregoing construction the Legislature may have power to abolish Courts when they become unnecessary—that the abolition of the Court can only take effect at the expiration of the Judge's term, otherwise we defeat that clause of the Constitution which says that the Judge's term shall be eight years. If the framers of the Constitution intended to leave it to the Legislature to establish and abolish Courts as the public necessities demanded, this was not qualified or limited by the clause as to the Judge's term of office. To so hold would be to allow the clause as to the length of the Judge's term to overthrow the other clause, whereas we construe the provision that the Judge's term shall be eight years to be upon the assumption that the Court continues to exist, otherwise we should have to hold that the Court must continue, although declared unnecessary and abolished by the Legislature, simply to secure to the Judge his full term and salary."

Again, said Judge McFarland, "It is argued that the Act abolishing the Court did not abolish the judgeship—that the relator might still be judge although his Court was abolished. Our Constitution does not recognize a judgeship except as the Judge is the incumbent of a Court or Courts which he is commissioned to hold. We have no supernumeraries,

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etc. If the law abolishing the Courts is valid, the offices and their incumbents necessarily cease, and, of course, along with them their salaries. . . . To dispense with an unnecessary Court is not to change the term of judgeship, nor is it to affect the guarantees of the Constitution as to his salary, nor does it remove the Judge from office. The office no longer exists, and, of course, a removal from an office that has no existence is not a conceivable proposition." Judge Freeman again dissented from the views of the majority, and filed an opinion in which his objections to the constitutionality of the Act are set forth with great vigor and earnestness.

It is obvious that in order to meet the exigencies of the present case we will be constrained to overrule two opinions of this Court, delivered by two of its ablest jurists, in which the very questions now presented were solemnly and deliberately adjudicated.

Lord Cairnes wisely said: "I think that with regard to statutes it is desirable not so much that the principle of the decision should be capable at all times of justification, as that the law should be settled, and should, when once settled, be maintained without any danger of vascillation or uncertainty." *Commissioners v. Harrison*, L. R., 7 H. L., 9.

"Where a question has been well considered," says Judge Harris, "and deliberately determined, whatever may be the views of the Court before which the question is again brought, had it been *res nova*,

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it is not at liberty to disturb or unsettle such decision, unless impelled by the most cogent reasons." *Baker v. Lorillard*, 4 N. Y., 261.

If the law was manifestly misunderstood or misapplied in the case decided, its primacy as a precedent may be overthrown. Those who antagonize the construction announced in the two cases decided by this Court cannot claim more than that the constitutional provisions involved are of doubtful interpretation. That doubt has been resolved against their contention in two decisions of this Court, and upon every principle, looking to certainty and stability in the administration of the law, those rulings should now be followed. They have been cited and followed in other jurisdictions, while the Pennsylvania and Indiana cases, maintaining the adverse view, have been discarded. *Aikman v. Edwards*, 30 L. R. A., decided by the Kansas Supreme Court, in 1895; *Van Buren Co. Supervisors v. Mattox*, 30 Ark., 566; *Grazier v. Lyons*, 72 Iowa, 401.

In *Aikman v. Edwards* the Court said, viz.: "While the independence and integrity of Courts in the exercise of all the powers confided in them by the Constitution should be firmly maintained, jealousy of encroachments on judicial power must not blind us to the just power of the Legislature in determining within constitutional limits the number of Courts required by the public exigencies, and the kind and extent of jurisdiction and functions to be discharged by each. We think," said that Court,

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“the Legislature has the power to abolish as well as create, to diminish as well as to increase, the number of judicial districts.” It should be observed that the constitutional provisions construed in that case were entirely similar to those involved herein.

The provisions of the Federal Constitution on this subject are almost identical with the Constitution of this State. The late Justice Miller, in his work on the Constitution of the United States, wrote, viz.: “The Supreme Court, once in existence, cannot be abolished, because its foundation is not in an Act of the legislative department of the government, but in the Constitution of the United States. . . . It cannot be abolished, nor its Judges legislated out of existence, although it has been forcibly urged, and probably with truth, that all the other Courts can, by legislative Act, be abolished and their powers conferred on other Courts or subdivided in different modes.” This is the opinion of one of the profoundest jurists that ever sat upon the Supreme Bench of the United States. In this connection it may be remarked that, in 1802, Congress repealed an Act under which sixteen Federal Judges had been appointed and commissioned during good behavior. It is true Story and Tucker, in their commentaries, express the opinion that the repealing Act was unconstitutional, and that a majority of all the ablest lawyers of that day were of the same opinion. But the best answer to this opinion of Mr. Story is that the authority of Congress to pass

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the repealing statute was not challenged in the Courts, and the Judges themselves acquiesced in their displacement. It is strange that an Act of Congress so palpably unconstitutional was not assailed if that was the opinion of the majority of all the ablest lawyers of that day.

It has been argued that the Coleman and Halsey cases were overruled by the later case of *State, ex rel., v. Leonard*, 86 Tennessee. The cases were wholly dissimilar. The question in the Leonard case, as stated by the Court, was whether the Legislature has the power to terminate the office of a Judge elected under a constitutional law and for a constitutional term of eight years, within that term, leaving the Court with its jurisdiction in existence and unimpaired, by simply devolving the duties of the office upon another official, namely, the Chairman of the County Court." In *Halsey v. Gaines*, 2 Lea, Judge McFarland had argued this could not be done. "We concede," said he, "that legislation which indirectly aims to legislate the Judge out of office before his constitutional term expires, under the guise of changing the circuit, or otherwise, would be unconstitutional and void." Judge Snodgrass, in his opinion in the Leonard case, discusses the Coleman and Halsey cases, and says "it is sufficient to say that the case here presents no such question as that determined there" (in those cases).

The cases of *Keys v. Mason*, 2 Sneed, 6; *Cross v.*

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Mercer, 16 Lea, 489, relating to the constitutional tenure of Justices of the Peace; *Powers v. Hurst*, 2 Hum., 24, relating to the constitutional office of Register; *Pope v. Phiifer*, 3 Heis., holding the quarterly County Court a constitutional Court, do not, in our judgment, bear the remotest kindred, either by affinity or consanguinity, to the cases now under consideration. They are not even mentioned in the majority or minority opinion in the Coleman-Halsey cases, nor in the Leonard case. The cause of *State v. Cummings*, 14 Pickle, in which we held the constitutional office of Sheriff inviolable, is not at all analogous to this case. Art. VII., Sec. 1, Constitution of 1870, provides: "There shall be elected in each county one Sheriff, one Trustee, one Register," etc. This provision is similar to the other clause providing for one Supreme Court. How different the other clause, empowering the Legislature from time to time to ordain and establish Circuit, Chancery, and other inferior Courts! One is established by the Constitution and the others are established by the Legislature.

Another objection to the constitutionality of this Act remains to be noticed. It is based upon Art. VI., Sec. 4 of the Constitution, which provides that "the Judges shall be elected by the qualified voters of the district or circuit to which they are to be assigned." As already seen, the Legislature, in this instance of the abolishing of the Eleventh Criminal Circuit, directed that the Circuit Judge of the respective

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counties formerly constituting the Eleventh Criminal Circuit should have and exercise criminal jurisdiction in said counties, except that Benton County should be detached from the Eleventh Civil Circuit and attached to the Twelfth Civil Circuit, and that Madison County, which was embraced in the Eleventh Civil and Criminal Circuits, should be attached to the Eighteenth Judicial Circuit, so far as jurisdiction in respect of criminal cases arising in said county was concerned, but excluding from the jurisdiction of said Court all civil causes arising in said county. The objection to the Act is that the Criminal Court of Madison County and the Circuit Court of Benton County are to be held by Judges who were not elected by the qualified voters of said counties.

The question now sought to be made arises upon the Act which attaches Benton and Madison Counties to circuits whose Judges the qualified voters of said counties had no voice in electing. If this question is fairly before us, the two Acts, being component parts of one plan to be considered and construed together, we should say, first, that the constitutional provision in question was designed to determine who should be electors of Judges—"They are to be elected by the qualified voters of the district or circuit to which they may be assigned."

It does not mean that a Judge may not exercise civil or criminal jurisdiction in a county unless he has been elected by the qualified voters of that

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county, for that would prevent the interchange of Judges and Chancellors. Moreover, the Act of the Legislature authorizing the Governor to make *pro tempore* appointments of Judges to fill vacancies until the next biennial election would also contravene this provision of the Constitution.

In *State, ex rel., v. Glenn*, 7 Heis., 472, it was remarked that this clause of the Constitution, providing for election of Judges by the qualified voters of the district or circuit, has not been supposed to take away the power of the Governor conferred by the Legislature to fill a temporary vacancy. The Constitution, Art. VI., Sec. 17, provides, viz.: "No county office created by the Legislature shall be filled otherwise than by the people." It was held this provision relates only to the mode of filling a temporary vacancy. *State v. Glenn*, 7 Heis., 472. So we think the present arrangement is in the nature of filling a temporary vacancy in the Circuit Courts of said counties. Judicial Circuit Judges were elected by the qualified voters of their respective circuits. The fact that Benton and Madison Counties have been attached to these circuits since the Judges were elected cannot affect their election or show they were not elected by the qualified voters of the circuit. It is true they were not elected by the qualified voters of Benton or Madison Counties, but they were themselves elected by the qualified voters of their respective circuits. There has been no election for

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Judges since the new counties were attached, but when there is an election the qualified voters of said new counties will of course participate.

The Constitution, moreover, does not provide that the election shall be by the qualified voters of the respective counties, but by the qualified voters of the district or circuit. By § 5708 Shannon's Code, "the Judges and Chancellors are Judges and Chancellors for the State at large," etc. The construction now sought to be placed upon this section of the Constitution would revolutionize and destroy our whole system. The Legislature has, from time to time, changed judicial circuits by adding and detaching counties, and its power to do so has never been challenged. *State v. McConnell*, 3 Lea, 332; *State v. Algood*, 87 Tenn., 163. If the Legislature has the power to abolish circuits, which we think is no longer open to question in this State, it must follow that it can reassign its parts. Construing a similar provision of its Constitution, the Supreme Court of Kansas, in *Aikman v. Edwards*, 30 L. R. A., 153, said, viz.: "The most substantial objection that can be urged against such a transfer as is made by this Act is that the people are placed in a district under a Judge in whose selection they have had no voice, and who might not have been chosen if all the people in the enlarged district had been permitted to vote at the time of his election. The reasons apply against the transfer of one county with just the same force as against the transfer of

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all the counties included within a district. Acts of the Legislature transferring a county from one district to another have very frequently been passed during the history of the State, and their validity has never been questioned. It has never been contended, so far as we are aware, that the Legislature is without power to change the boundaries of judicial districts by deducting counties from one and adding them to another, nor has it been doubted that the Legislature might do this during the continuance in office of any Judge."

In our opinion the power to detach counties from one circuit and add them to another is clearly within the constitutional grant of authority conferred upon the Legislature to ordain and establish from time to time Circuit, Chancery, and other inferior Courts, and it is not a valid objection to the exercise of the power that it may result in placing the people of the county so transferred temporarily under the jurisdiction of a Judge in whose election they have had no voice.

Affirmed.

Judges Caldwell and Wilkes concur. Chief Justice Snodgrass and Beard dissent.

JUDGE WILKES' OPINION.

WILKES, J. The questions involved in these cases having been fully stated, I proceed at once to their consideration and decision.

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The question underlying both is the extent and authority of the power of the Legislature, in view of the provisions of our Constitution. That instrument, Section 3, Article XI., declares, "The legislative authority of this State shall be vested in a General Assembly." It nowhere attempts, in general terms, to limit this power and authority, and it is a well-settled rule of construction that a Legislature, in its sphere of legislative action, has unlimited power, except so far as restrained by the Constitution of the State or the United States. It does not derive its power from the Constitution, but has all power not expressly withheld from it by the Constitution so far as the legitimate sphere of its action extends. While, under our form of government, Congress has only such power as is conferred upon it by the Constitution of the United States, a State Legislature has all and every power not expressly withheld from it by the organic law of the State or Union that properly pertains to a legislative body. *Henley v. State*, 98 Tenn., 665 and cases cited; 6 Am. & Eng. Enc. L. (2d Ed.), 933.

The ordaining and creating of Courts and their abolition, and the removal of Judges from their offices, can neither be said to be strictly a legislative function, and hence we may upon these matters look to the constitutional provisions, and they must, so far as they extend, form a guide for legislative action and a check upon legislative power.

It is another familiar rule that no Act of the

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General Assembly can be annulled and set aside by the Courts, unless it contravenes and conflicts with some provision of the Constitution, and whenever the validity of any Act is assailed, the specific provision of the Constitution which it expressly, or by unavoidable implication, violates, must be pointed out. *Henley v. State*, 98 Tenn., 665.

An Act cannot be annulled because, in the opinion of the Court, it violates the best public policy, or does violence to some natural equity, or interferes with the inherent rights of freemen, nor upon the idea that it is opposed to some spirit of the Constitution not expressed in its words, nor because it is contrary to the genius of a free people, and hence the wisdom, policy, and desirability of such Acts are matters addressed to the General Assembly, and must rest upon the intelligence, patriotism, and wisdom of that body and not upon the judgment of this Court. The only question for this Court is, Does the Act or resolution violate any provision of the Constitution, expressly or by necessary implication? *Henley v. State*, 98 Tenn., 665; 6 Am. & Eng. Enc. L. (2d Ed.), 923.

The provisions of the Constitution which relate to the judicial department are as follows: "The judicial power of this State shall be vested in one Supreme Court, and in such Circuit, Chancery, and other inferior Courts as the Legislature shall, from time to time, ordain and establish, in the Judges thereof and in the Justices of the Peace." Consti-

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tution, Art. VI., Sec. 1. It is further provided in Sections 4 and 7, in substance, that the Judges of the inferior Courts shall be elected by the qualified voters of the district or circuit to which they are to be assigned; that their term of office shall be eight years; that to be eligible they must have been residents of the State for five years and of the circuit or district one year; that they shall at stated times receive a fixed compensation for their services, to be ascertained by law, and which shall not be increased or diminished during the time for which they are elected.

It is urged with much force that the proper construction and unavoidable implication arising out of these provisions, when considered together, as they must be, is, that the people of any particular county, circuit, or district are entitled to have over them Judges of their own selection, and not others in whose election they have had no voice; that these Judges must be residents, when elected, of the particular circuits and districts over which they preside; that such Judges shall have a tenure of office of eight years and a fixed compensation during that time, to be paid at stated intervals, and which shall not be lessened or increased during the term. It is insisted this latter feature is essential to the independence and integrity of the judicial department, and hence any law abolishing a Court, thereby bringing the people who had been subject to its jurisdiction under a different Court and Judge, or any

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act or resolution which removes a Judge from office, and thus deprives him of his compensation for the term for which he was elected, and deprives the people who had elected him of his services, is contrary to these provisions by necessary and unavoidable implication.

All of these questions do not arise in the case of the defendant, Lee Thornton, since he was, when he was removed and his Court abolished, holding under an executive appointment, and not under an election, and the business of his Court was simply transferred to another Chancellor, elected by the same people and having a local jurisdiction the same in extent and otherwise, but it is not insisted that there is any difference between an appointed Judge and one elected, and the whole question of the abolition of Courts and removal of Judges, under various acts passed at the last session of the General Assembly, has been argued before us and treated as involved.

It is evident that, under our judicial system, Judges and Chancellors, no matter where elected, nor by whom, are officers for the State at large, and not merely for their own circuits or divisions. The statute (Shannon, § 5707) says: "Each Judge or Chancellor is required to reside in the judicial district or division for which he is elected, and a removal therefrom shall create a vacancy in the office."

By § 5708 it is provided: "The Judges and Chancellors are, however, Judges and Chancellors for the State at large, and, as such, may, upon inter-

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change and upon other lawful grounds, exercise the duties of office in any other judicial circuit or division of the State.”

Accordingly, under both the Constitution of 1837 and that of 1870, the Legislature has, from time to time, repeatedly transferred counties from one circuit or division to another having a different Judge not elected by the people of the county transferred. It has also consolidated Courts, and abolished them, and transferred causes to other Courts, as it deemed for the public interest. A few instances, by way of illustration, will suffice to show the extent of the power claimed and exercised by the Legislature.

In 1865 the counties of the Fourteenth Judicial Circuit were distributed to the Eleventh, Twelfth, and Fifteenth, and the Fourteenth Judicial Circuit was abolished.

In 1867 (Ch. 25, Sec. 4) the Circuit and Chancery Courts of Overton were consolidated, and the process of the Chancery Court was made returnable on the Circuit Court days.

The Common Law and Chancery Courts of Memphis was separated by the Act of 1866 (Ch. 32) into two Courts, and a new Judge made.

On December 4, 1869, by Ch. 28, Sec. 2, “the present Circuit Court of Shelby County, the Law Court of Memphis, the Municipal Court of Memphis, the Chancery Court of Memphis, and the Criminal Court of Memphis were abolished,” and by Section 3 six new Courts were established. This

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was just before the Convention of 1870, which met on January 10, 1870.

December 3, 1869, the Seventeenth Circuit was abolished (Ch. 25, Sec. 1).

County Judge's office was abolished in Sumner, Shelby, Giles, Lincoln, Smith, Weakley, Wilson, and Van Buren Counties, in October and November, 1869; in Anderson, November 1; in Cheatham, November 27.

Session of 1870, office of County Judge of Knox County was abolished. Removal of county seat of Hamilton and merger of Courts provided June, 1870. Office of County Judge of Lauderdale abolished.

On June 24 and June 28, 1870, the circuit and chancery districts were organized by the Legislature, and fifteen circuits were made, where before there were seventeen and twelve chancery districts.

Chancery Court of Madisonville abolished January 26, 1871.

Quorum Court of Carroll and DeKalb abolished.

These citations are taken from a brief upon the subject, prepared by Hon. J. B. Heiskell, formerly Attorney-general of the State, a member of the Constitutional Convention of 1870, and Chairman of its Judiciary Committee. We have not been accessible to the Acts to verify the citations. Cases in which this power of adding counties to, or detaching them from, existing circuits or divisions was involved, have passed in review before this Court, and the

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validity of the Acts involved questioned on other grounds, but this power appears to have been conceded *State v. McConnell*, 3 Lea, 332; *State v. Algood*, 3 Pickle, 163.

In the great majority of cases of this character no question of the power of the Legislature has ever been made. However, in the case of *State v. Campbell*, decided at Jackson in 1875, the constitutionality of the Act of March 15, 1875, was drawn into question, and was ably and clearly contested. The object of that Act was to abolish the Second Circuit Court and the Second Chancery Court of Shelby County. It required the records and papers of the two Courts to be transferred to the First Circuit and First Chancery Courts of Shelby County, respectively, and provided for the hearing in these Courts of causes pending in the abolished Courts, and repealed the Act of December 4, 1869, under which the Courts of Shelby County were organized and the Second Circuit and Second Chancery Courts established. The suit was an action by the clerk of the surviving Court to compel the clerk of the abolished Court to deliver to him the records and papers of the abolished Court. The opinion was delivered by Chief Justice Nicholson, who had been one of the most prominent members of the Constitutional Convention of 1870, and within five years after the framing of that instrument, which is still the organic law, and when the proceedings and deliberations of that body were fresh in his mind.

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He stated the questions involved in the case in this language: "The question is whether the Legislature has the power, under the Constitution, to abolish these two Courts and to transfer the causes therein pending to be heard and determined in the other two Courts of Shelby County to which they were transferred. If the Legislature had the power to enact the law, it must be either because the ordaining and establishing of Courts is a legitimate legislative power, necessarily involving the power to abolish, as well as to ordain and establish, and that the Constitution has placed no restriction upon the exercise of this power inconsistent with the action of the Legislature in the present case, or because the Constitution, either expressly or by necessary implication, has vested in the Legislature the power to ordain and establish Courts, and that this power carries with it the power of abolishing existing Courts. It is maintained by the Attorney-general and counsel for the State that the Act in question is constitutional and valid on both of these grounds, while the counsel for the relators insist that the two Courts abolished by the Act were so guarded and protected by the Constitution that, in the exercise of its power to ordain and establish Courts, these two Courts could not be abolished.

The Court proceeds to discuss the questions involved in a manner at once exhaustive and able, and arrives at a conclusion that the Acts were valid and constitutional. We cannot hope to add anything

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to the force and reasoning of the opinion in this case. With one immaterial difference, the case presents every question that could arise in the consideration of the present Acts, which attempt to abolish Circuit, Chancery, and special Courts, and it is well worthy the perusal of every lawyer and other person interested in the important question involved. The case is now for the first time reported in 3d Tennessee Cases, pages 355 to 368, and we will not mar its force and symmetry of reasoning by attempting to make extracts from it, and it is too lengthy to be copied in full. We can add nothing to it, and we do not feel disposed, for reasons hereafter stated, to take anything from it. An able dissenting opinion was filed by Mr. Justice Freeman, which is also worthy of perusal and closest attention.

In the case of *Halsey v. Gaines*, 2 Lea, 316, the question came up the second time before this Court. In that case the Judge of the abolished Court sought to compel the State Comptroller to issue warrants for his salary after his Court was abolished, and again the sole question considered was the constitutionality and effect of the abolishing Act. The Court was divided as in the Campbell case, Justice McFarland delivering the opinion of the majority, and after a very painstaking and careful consideration of the whole question, again sustained the constitutionality and validity of the Acts. There was also an exhaustive dissent by the same

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Judge (Freeman) who dissented in the Campbell case. These judicial interpretations, in addition to the fact that they are able and learned and by Judges who are equal to any who have ever adorned the bench of Tennessee, have the added force of holdings almost contemporaneous with the promulgation of the Constitution itself, and by men some of whom were members of the Convention. Such contemporaneous construction, judicial and legislative, is entitled to great weight. 6 Am. & Eng. Enc. L. (2d Ed.), 931, 932.

It is said the case of *The State, ex rel., v. Leonard*, 86 Tenn., is not in accord with these rulings. The opinion in that case cites the former opinions, and states that it differs with their reasoning in some respects, but also disclaims any intention to overrule them. The question involved in that case was not identical with that involved in the former cases nor in this case. The Act of March 14, 1887, then brought into question, undertook to abolish the office of County Judge of Marshall County, and to transfer his powers, duties, and jurisdiction, without diminution or change, to the Chairman of the County Court to be elected by that body, and the Act was held to be invalid and unconstitutional. It was also held in that case that a County Judge elected under a valid law was entitled to hold his office for the constitutional term of eight years, although the statute creating the office may have prescribed a shorter term of four years. The

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case was differentiated from the former cases in the able opinion of the present Chief Justice, Snodgrass, in the following language:

“It is sufficient to say that the case here presents no such question as that determined there. The Act of 1875 construed [in the Halsey case] had abolished the [Memphis] Court. It did not leave the Court with all its powers, jurisdiction, rights, and privileges intact, and devolve them upon another, as in this case.

“Here the Court was left as it existed, except the change made in its official head. He was simply removed by operation of the Act, if it could take effect according to its terms, and another put in his place.”

The Leonard case applies only to a County Judge, where only one can exist in a county, and where his functions and duties cannot be devolved upon another, and is different from cases involving Circuit, Chancery or other judicial officers who preside over a system of courts common to the whole State. In the former class of cases the jurisdiction and business of the abolished court must necessarily go to a Judge created especially by the Legislature to receive them. In the latter class Judges are Judges for the State at large, and the transfer is not of jurisdiction but of business; not to a Judge specially created, but to a Judge already elected by the people and clothed with authority and jurisdiction to act.

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These cases we consider to be conclusive upon the right of the Legislature to abolish or change judicial circuits or districts, or special courts, and so far as this feature of the controversy is concerned, the case might be left to rest upon their authority. It was in view and consequence of this holding of the Court that the General Assembly framed its legislation when in its wisdom it saw proper to reorganize the judiciary and dispense with what it deemed unnecessary offices and officers. These holdings and constructions given by the Court to constitutional provisions, which have been made the basis and foundation for legislative action, should not be departed from, even though, if the matter were *res integra*, this Court or members of it should be disposed to entertain contrary or modified views of the subject. We know, as a part of our history, that this action by the Legislature was not only based upon this holding by the Courts, but was in obedience to a public demand which had been impressed upon the members when elected. But examining the question without regard to these adjudications, we find, as we think, a safe guide to the interpretation of these constitutional provisions, arising out of the proceedings of the Convention which framed the Constitution. It is evident from the provisions of the Constitution that but few limitations were intended to be placed upon the power of the Legislature to create, establish, and change inferior Courts. Limiting safeguards were placed

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around the Supreme Court, to protect it both from legislative and executive control, which were not placed around the inferior Courts. It was provided there should be but one Supreme Court, so that its powers and prerogatives could not be lessened by being divided; the number of Judges was fixed, so that it could neither be increased nor diminished; the places of holding its Courts were fixed, so that they could not be changed. None of these limitations were thrown around the inferior Courts. The number of Courts, the number of Judges, and the places of holding these Courts was left to be determined by the Legislature. Why this distinction between the supreme and inferior Courts was made we need not now stop to consider. It was not done, as we know, without an effort to place restrictions also upon the Supreme Court, and to put it likewise within the control of the Legislature. It appears that a resolution was submitted by Hon. John M. Taylor, a delegate to the Convention of 1870, and one of the officials now concerned in these proceedings, providing that the Supreme Court should consist of a Chief Justice and four associate justices, and that the number of associate justices might be increased or decreased by law, but should never be less than two. Journal of the Convention, page 59. This resolution was referred to the Judiciary Committee, but never became a part of the Constitution, and the Convention refused to

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put the Supreme Court to this extent under the control of the Legislature.

The Convention did see proper to restrict the Legislature in the enactment of certain other statutes, such as retrospective laws, laws impairing the obligation of contracts, laws increasing or diminishing certain official salaries, but it did not place any restriction upon the enactment of statutes similar to those under consideration so far as they relate to inferior Courts and Judges. An effort, however, was made to do this. Hon. Henry R. Gibson, a member of the Convention, offered the following as an independent section: "The Legislature shall, from time to time, by a general law, divide the State into judicial circuits and chancery districts or divisions, so that the number of circuits shall not exceed one for every sixty thousand inhabitants, and the number of chancery districts or divisions shall not exceed one for every seventy-five thousand inhabitants; *Provided*, That territory and population shall be so equalized as to equalize the labors of the several Judges and the several Chancellors as nearly as possible. And no circuit, district or division shall be created otherwise than by a general law recircuiting or redistricting the entire State." Journal, 237. This was defeated, and the Convention refused to make it a part of the Constitution. While thus refusing to relax any of the restrictions upon legislative power over the Supreme Court imposed by the Constitution of 1834, as evidenced by

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the rejection of the Taylor resolution, the Convention refused to impose any restrictions upon legislative power over the inferior Courts, except simply to preserve a system of Circuit and Chancery Courts, as evidenced by the rejection of the Gibson resolution.

It is insisted there is a difference between the abolition of a Circuit Court and the removal of the Circuit Judge, as in the case of Judge Taylor, and the abolition of one of two Courts in the same territory and the removal of one of the Judges, leaving another with the same local jurisdiction, as in the case of Judge Thornton; and the Campbell case and the Halsey case are referred to as belonging to the latter class and standing upon the same footing as the Thornton case. This argument proceeds upon the idea that in the abolition of a Circuit Court and removal of a Circuit Judge the people within that local jurisdiction are necessarily compelled to pass under a Judge in whose election they never had a voice, while in the cases such as Campbell's, Halsey's, and Thornton's there remains a Judge elected by the people and a Court with the same power and jurisdiction, local and otherwise, which pertains to the one abolished, and so the people are not required to pass under a Judge whom they did not aid in electing, but still have a Judge selected by themselves. We think this argument specious, for several reasons. In the first place, if the people of any particular locality have

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elected two Judges to preside over them, upon the reasoning assumed they are entitled to both, and, in having their controversies determined, to a choice between the two, and neither can be abolished or removed. In the next place all Judges and Chancellors have jurisdiction co-extensive with the limits of the State, and, while they are expected to preside where they were elected, they can preside elsewhere. Again, whenever a new circuit or Court is established, the office is filled by appointment of the Governor until the next election, and not by a vote of the people until that time, and, while this may be in consequence of a special constitutional provision, it is in accord with the whole theory and system of our judicial department. We may grant that, as a general provision, it is intended the people shall elect their own Judges; still in exigencies, when it becomes necessary, Judges may be appointed until an election can be had, and this is virtually what is done in cases when a Circuit Court is abolished and a Circuit Judge removed, and the citizens of that locality transferred temporarily to other Courts and Judges.

The decisions of other States are conflicting upon the questions here involved. Perhaps a few of the State Constitutions do not contain the removal clause. It is not to be found in the Federal Constitution. There are leading and important cases reported in Pennsylvania, Indiana, Illinois, and Wisconsin that

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support the contention of the Judges. There are others in Kansas, Iowa, and Arkansas that sustain the views herein expressed.

The case of *Aikman v. Edwards*, decided in 1895 by the Supreme Court of Kansas, considers the question more elaborately than any other, and may be found in 30 L. R. A., pages 149 to 155. By an examination of the opinion of the Court and the briefs of counsel, it will be seen that all the questions raised in this case were then forcibly presented, elaborately argued and maturely considered in the light of constitutional provisions very similar to our own. It was there urged that Judges were constitutional officers, and had a vested right in their offices; that their terms were fixed by the Constitution, and could not be abridged or destroyed; that it was the intention of the Constitution that they should not be disturbed in their offices for any cause except malfeasance in office; that taking away the territory of the officer in effect took away the office, and that the exercise of power of removal would destroy the independence of the judiciary. On the other hand, it was insisted for the State that the Constitution did not, directly or indirectly, prohibit such action by the Legislature as the abolition of Courts, and, such being the case, that body had the power to do so, and the passage of the Act was conclusive upon the Courts of the wisdom and necessity of the Act, and the fact that thereby the terms of judicial office were lessened would not

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render the Act unconstitutional. A large number of authorities from different States were cited and relied on, and considered and commented on by the Court. The provisions of the Constitution of Kansas are set out, and upon the features of abolishing Courts and removing Judges are very similar to those in the Constitution of Tennessee. The opinion is too long and elaborate to be copied, but it is worthy of perusal. It antagonizes the cases of *Com. v. Gamble*, 62 Pa., 343 (1 Am. Repts., 422); *State v. Friedly*, 135 Ind., 119 (21 L. R. A., 634); *People v. Dubois*, 23 Ill., 547, and *State v. Messman*, 14 Wis., 177. The condition of affairs which caused the abolition of the Courts in Kansas was quite similar to that existing in Tennessee. By previous legislation judicial districts had been created which were found to be unnecessary and the salaries necessary to support them burdensome, and the people demanded the abolition of useless offices, and the Acts were passed abolishing the Courts in recognition of this public demand. It will be noted, however, that the matter was in that case placed before the Court under somewhat different circumstances from those presented in this case, and it is not directly in point. The case did not involve the removal of an officer from office by the abolition of his office, but presented the question of the right of the relator to become a candidate to fill the office which the Legislature had abolished. The Act itself provided that it should not be construed as to de-

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prive any Judge of his salary. The contention, as broadly made, was that the Legislature could not abolish the circuit which it had established, and, this being so, the office of Judge still existed, and the relator had a right to become a candidate for it, and the Court very properly said that the relator did not claim any vested right in the office, and that the question of the right of the Legislature to deprive a district Judge of the compensation allowed by law was not involved; and the Court declined to discuss the question whether there could be a Judge without a district or Court over which to preside, and the question was not involved.

The leading and strongest case holding a view contrary to this is that of the *State of Indiana v. Friedly*, which may be found in 21 L. R. A., 634, in which the question was fully presented, elaborately argued, and maturely considered and decided by the Supreme Court of Indiana in view of the provisions of the Constitution of that State. The real points decided in that case were that a Judge whose term of office is fixed by the Constitution cannot be deprived of his office or of the exercise of its duties before the expiration of his term, by a statute attempting to abolish the judicial district to which he was elected. The removal of a Judge under a constitutional provision was not involved. This case is also well worthy of perusal, and presents the question of the abolition of Courts, and offices in consequence, strongly

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in favor of defendant's contention. There are numerous other authorities cited in these cases and elsewhere, but we need not quote them here. 19 Am. & Eng. Enc. L., 562; 6 Am. & Eng. Enc. L., 2d Ed., 1047.

We are cited by defendant's counsel to a number of cases in our own reports in support of their contention, and to them we make a brief reference, with the general statement that none of them are applicable to the present case. With three exceptions they were cases decided prior to the cases of Campbell, Halsey and Leonard, and yet were not cited by the Court in those cases, nor, so far as we can learn, relied on by counsel. We cannot presume they were overlooked.

The first case is that of *Norment v. Smith*, 5 Yer., 270, in which it was held that the Act of 1827, Ch. 37, authorizing the Governor to appoint a special Judge in case of sickness or bodily infirmity of a Circuit Judge, was unconstitutional and void under the Constitution of 1796. This was remedied by the Constitutions of 1834 and 1870 by express provisions, and the case itself has been seriously questioned, if not overruled, by the case of *Venable v. Curd*, 2 Head, 586, and was only a majority opinion in the first instance. So far as this case touches the real question at issue in the present one, it is antagonistic to the views of the defendant, as it illustrates the greater power vested in the Legislature over the judiciary by the Constitutions of 1834

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and 1870, when compared with that of 1796, and it serves also to show that the disastrous results foreshadowed in the views of Chief Justice Catron as liable to happen, if the power of appointing a special Judge was conceded, have proved to be entirely baseless by our subsequent judicial history.

The case of *Brewer v. Davis*, 9 Hum., 208, is one affecting the tenure of office of the Clerks of inferior Courts, who under the Constitution are given a term of four years. It was held *arguendo*, but no doubt correctly, that the term could not be changed by the Legislature so as to eject one incumbent and install another during that time. This is in accord with all the cases, but is not applicable to the case at bar.

The case of *Keys v. Mason*, 3 Sneed, 7, is a case under the Constitution of 1834, which fixed the term of office of Justices of the Peace at six years, and it was held that a Justice elected to fill a vacancy was entitled to hold the full term of six years, not merely for the unexpired term of his predecessor. This provision in regard to filling vacancies was changed by the Constitution of 1870, and furnishes another illustration of the trend of constitutional and legislative action to provide for a shorter term of office under certain conditions, though the term, in the absence of such conditions, remained as before. It is well to note in this connection that neither of our Constitutions made Justices of the Peace impeachable or liable to removal by reso-

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lution of the Legislature, as was provided in case of Judges.

Pope v. Phifer, 3 Heis., 682, simply holds that the County Court is one of the judicial institutions of the State recognized by the Constitution, and that its functions cannot be taken away from it and devolved upon another body.

The case of *State v. McKee*, 8 Lea, 24, is to the effect that while a Judge of the County Court is a constitutional officer so far as pertains to his judicial functions, he is also general agent and accounting officer of the county, and may receive extra compensation for services in that capacity.

The case of *Cross & Mercer ex parte*, 16 Lea, 486, holds that the Legislature has no power to abridge the term of office of a Justice of the Peace to a period less than that fixed by the Constitution of six years. The case is distinguished from the Campbell and Halsey cases by the same Judge (Freeman), who dissented in those cases, and shown to be not a parallel case, and this is so obviously apparent that we will not discuss it.

The case of *State v. Cummings*, 15 Lea, 667, holds that the Legislature cannot deprive the Sheriff, who is a constitutional officer, of a substantial part of his powers and functions. The office of sheriff is one *sui generis*. It is provided for by the Constitution, but the duties of the office are not defined. There can be only one in any county, and no other officer in the county

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has the same functions and powers. The same is true of the County Judge as in the Leonard case, and the County Register, as in the case of *Powers v. Hurst*, 2 Hum., 24. They are all officers recognized by the Constitution, and there is no other officer upon whom the same functions and powers are devolved, and the Legislature can create no other. There is no provision for ordaining and establishing a number of these offices. In many respects they stand upon a footing similar to that of Supreme Judges. There can be but one Supreme Court for the State, one County Judge, one Sheriff, and one Trustee and Register for a county, and the Legislature has no power to create more, nor can their powers, duties, and functions be taken from them and devolved upon others. Upon this proposition alone the Leonard case is abundantly supported.

There are cases cited from other States, notably *Com. v. Gamble* (Pa.), 1 Am. Rep., 422; *Fant v. Gibbs*, 54 Miss., 396; *Hoke v. Henderson*, 25 Am. Dec., 675 *et seq.*, but this Court, in the Halsey case, refused to follow them.

It is said upon the one hand that the power to create and establish Courts and Judges carries with it the power to abolish and regulate, and, on the other hand, it is said the Constitution does not give the power of removal. If the latter contention be correct, it follows that once a Court always a Court, once a judgeship always a judgeship, and the logi-

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cal result would be that when a Court or judicial circuit is once established it could never be changed or abolished. No one takes this extreme view, but it is conceded that the Legislature has the power to change and abolish, provided the tenure of the Judge is not interfered with, and the people are not transferred to a district or circuit presided over by a Judge whom they have had no voice in electing.

It cannot be insisted that there is any express prohibition against abolishing a Court, except at such time as the term of office of its Judge expires, but the strength of defendant's contention is based upon that provision of the Constitution which gives to Judges a term of office of eight years and a stated salary. And it is argued that this term cannot be abridged, nor the officer removed, nor the Court abolished, so as to affect the right of the Judge to discharge its duties and receive compensation for the constitutional term. The eight-year term of office is thus made the constitutional limitation upon the power to abolish the Courts. It must be evident that the provision that the term of service shall be eight years is not unconditional and absolute. On the contrary, it is subject to many contingencies and conditions. For instance, the term is not eight years if the incumbent dies or is impeached, or becomes incompetent by removal from the district or State, or if he shall be convicted and sentenced for felony, or shall be removed by the adoption of a new Constitution. If the term of office can be

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abridged by these means, why may it not be by the abolition of the office or by removal of the incumbent by the General Assembly? The implication is as strong against any abridgment of the term in the one case as in the other. It has never been held in this State that an official holds his office by virtue of any contract which is protected by constitutional provision. Even in jurisdictions where this doctrine most strongly prevails, it is said that offices are only subjects of property so far as they can be so treated in safety to the general interests involved in the discharge of their duties. And as is the creation, so is the continuance of the office a question of sound discretion in the Legislature, of which the Court cannot question the exercise. When the office ceases to be required for the benefit of the people, it may be abolished. There is no obligation on the Legislature or the people to keep up a useless office or pay an officer who is not needed. He takes the office with the tacit understanding that the existence of the office depends on the public necessity for it, and that the Legislature is to judge of that. *Hoke v. Henderson*, 25 Am. Dec., 677, a North Carolina decision by Ruffin, Chief Justice.

The doctrine, tersely stated, is, that the rights of the individual must give way to the rights of the public, and the tenure of office is controlled by the general welfare and the interests of the public, and they must control the term of office instead of being controlled by it, and this is the holding of our cases.

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Much that has been said in regard to the abolition of Courts is directly applicable also to the resolutions of removal. The "causes" of removal, as set out in the resolutions and other proceedings relating thereto—and they are all substantially the same—are that the public business will not justify the retention in office of the Judges involved; that the public welfare requires a redistricting of judicial circuits and chancery divisions; that a reduction in the number of inferior Judges and compensation to be paid them is demanded in the interest of public economy, and that the Courts over which they have presided have been abolished as unnecessary. It will be noted that there is no charge of incompetency or dereliction of duty or want of fidelity in the discharge of his duties ascribed to any Judge or attorney who is removed; but, on the contrary, the resolutions testify to and emphasize the eminent ability, fidelity, purity, and faithfulness of the officials in private and official life.

The constitutional provision under which this removal is effected was in this language, to wit: "Judges and attorneys for the State may be removed from office by a concurrent vote of both houses of the General Assembly, each house voting separately; but two-thirds of the members to which each house may be entitled must coincide in such vote.

"The vote shall be determined by ayes and noes, and the names of the members voting for or

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against the Judge or attorney for the State, together with the cause or causes of removal, shall be entered on the Journal of each house, respectively.

“The Judge or attorney for the State against whom the Legislature may be about to proceed, shall receive notice thereof, accompanied with a copy of the causes alleged for his removal, at least ten days before the day on which either house of the General Assembly shall act thereon.” Const., Art. VI., Sec. 6.

It is conceded that the Legislature has the power to remove Judges and attorneys for the State under this provision, but it is insisted that the true interpretation of the word “causes” is that such removal can be had only for reasons personal to the official, and does not embrace reasons and grounds of public economy and public policy. I insist that no such narrow or limited construction can be given to the term “causes” as used. A provision similar to this one contained in our Constitution is found in that of a majority of the States of the Union. It exists in Alabama, Arkansas, Colorado, Connecticut, Delaware, Georgia, Florida, Illinois, Kansas, Kentucky, Louisiana, Michigan, Maryland, Mississippi, Minnesota, Missouri, New York, New Hampshire, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, West Virginia, and Wisconsin.

In different States the power of removal is vested in different tribunals and to be pursued in different

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modes—sometimes by the Governor, sometimes by the General Assembly, and in other States by the Supreme Court. The modes prescribed are substantially the same. Some of the State Constitutions specify, either in general or special terms, the grounds upon which removals may be made. In Delaware, Kentucky, Nevada, and Louisiana removal may be for any reasonable cause; in Alabama, South Carolina, Michigan, Mississippi, Pennsylvania, and Texas it may be for any willful neglect of duty or any other reasonable cause which shall not be sufficient ground for impeachment; in Georgia and Rhode Island by impeachment or upon conviction of any crime; in Indiana for corruption or for any high crime; in Oregon for malfeasance, misfeasance, or willful neglect of duty; in West Virginia upon conviction of willful neglect of duty or misbehavior in office, or any other crime; in Maryland on impeachment; in Ohio upon complaint; in Illinois, Missouri, New York, Tennessee, Virginia, and Wisconsin for “cause,” without any limitation or definition of that term. The language of our Constitution enumerates no causes of removal, not even by general classification. It gives no hint of the nature of the causes for which removal may be had. The power of removal, as therein declared, is broad, general, and unrestricted. The tribunal to which the power belongs, inherently and by declaration, is one of general powers, unlimited except by Constitution.

The term “cause or causes” signifies nothing as

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regards the nature of the grounds for removal. The language indicates that the whole matter was left to legislative discretion, and that any cause dictated by the public interests is sufficient. The history of this clause, and its predecessors, is instructive and conclusive of this view.

In England the proceeding was known as removal by address, and consisted of an address of both houses of Parliament to the sovereign for removal of a Judge. When it was sought to provide for removal by address in framing the Constitution of the United States, the proposition was bitterly antagonized, and received in the Convention the vote of only one State, to wit: New Jersey. 3 Story on Const., 484.

No removal clause is found in our Constitution of 1796, probably by reason of antagonisms excited by the then recent debates in the convention that framed the Federal Constitution. The clause is found in the Constitutions of 1834 and 1870 in practically the same language. The first time was but a short while after the fearful struggle in Kentucky over a similar provision. It was antagonized in both conventions, and has passed twice through the fire of discussion. The proceedings of these conventions, in relation to this clause, as preserved in the journals, leave no doubt that it was intended the Legislature might remove for any cause whatever that might be deemed for the public good.

In the Convention of 1834 the following occurred:

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Mr. Huntsman offered to amend the clause by adding: "And the Judge shall be served with a copy of charges to be exhibited against them at least twenty days before the General Assembly shall act upon his removal."

In lieu of which Mr. Humphreys offered the following: "Judges for any reasonable cause, which may not be sufficient for an impeachment, may be removed from office," etc.

Mr. Huntsman accepted this amendment, which was rejected by a vote of 33 to 23.

The proposition confining the clause to "infamous and corrupt conduct," and requiring a trial, was rejected.

These proceedings are significant.

The Convention of 1870 witnessed another and more doubtful struggle over this clause. It was reported, without material change, from the corresponding clause in the Constitution of 1834. When it came up for adoption, Mr. Gibson offered the following amendment, seeking to define and limit the legislative power of removal to the causes named therein: "Insert between the words 'office' and 'by,' in the first line, the words 'for crime, corruption, habitual drunkenness, incompetency, or neglect of duty.'"

Mr. Fentress offered in lieu the following: "Insert after the word 'State,' first line, the words 'for official corruption, or for continued neglect of

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duty, or continued incapacity of any kind to perform the duties of his office.' ”

A motion to lay both amendments on the table failed.

Mr. Turner offered the following amendment: “ *Provided*, The causes of removal are such as are prescribed by a general law of the land, passed by a Legislature prior to the one taking action thereon.” Journal, 225.

Mr. Cobb then offered, in lieu of the entire clause as adopted, the following: “If any cause of removal assigned amounts to a charge of infamous or corrupt conduct, then a Judge shall be tried by impeachment, or the Attorney-general by impeachment or indictment; or if guilt has been ascertained by previous indictment for a crime not committed in office, then they may be removed, as aforesaid, without further trial, and, in either case, the Judge or Attorney-general shall be suspended from office from the time of impeachment or indictment filed until the end of the trial.” This was likewise rejected. Journal, 229. The clause resisted a motion to strike out by a vote of 42 to 14.

These proceedings show a determined purpose to limit, and an equally determined purpose not to restrict, the legislative discretion as to causes of removal. The proposition naming the grounds for removal as “charges to be exhibited,” was too strong. The weaker term, “causes,” was adopted. The proposition naming the grounds, as “for any

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reasonable cause which may not be sufficient for impeachment," was too restrictive, and was rejected.

Some confusion appears in the journal as to the voting upon the several amendments, but the final result was the rejection of all amendments and the adoption of the clause as reported by the committee, without change. Journal, 227-230.

It is significant that the Convention, after a struggle between forces nearly equally divided, refused in any way to define the causes for removal. Three propositions for this purpose were submitted and rejected. The first two covered a very broad field, and yet did not meet the views of the majority. The third was a proposition that the Legislature should, by law, define the causes. But the majority would not submit to even this limitation of the clause. The minority wanted the legislative power defined and limited, but failed. The majority wanted it left without limitation, and succeeded.

Art. V. of the Constitution deals with impeachment. Art. VI., in which is found the clause under consideration, deals with the judicial department. Both articles were reported in the Convention of 1870 by the same committee, to wit: the Committee on the Judicial Department, and at the same time. Among the distinguished lawyers on the committee were A. O. P. Nicholson, John Baxter, W. B. Staley, and J. B. Heiskell, the latter its chairman. Journal, 42.

In Art. V. it was provided that all Judges and

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Attorneys for the State should be "liable to impeachment whenever they may, in the opinion of the House of Representatives, commit any crime in their official capacity which may require disqualification." Art. V., Sec. 4. A trial and mode of procedure are provided for in this article. The House prefers the articles of impeachment and prosecutes them by its members. The Senate, presided over by the Chief Justice, is the tribunal for trial. The trial is had after the adjournment of the Legislature *sine die*. Concurrence of two-thirds of the Senators, sworn to try the officer impeached, was required for conviction. The judgment, upon conviction, was removal from office and disqualification thereafter to hold office. In view of these proceedings and the provisions of the Constitution relating to impeachments, what scope and operation did the Convention intend the removal clause to have? It is conceded that it was intended to apply when the cause of removal was personal to the Judge, and it is insisted that it goes no further. In other words, a Judge who has become physically or mentally unable to discharge the duties of his office may be removed, but one who is able to work cannot be, even though there is nothing for him to do. I cannot consent to such construction, and, I ask, what warrant is there in the language of the Constitution for such construction as leads to the result that a Judge who, by misfortune or overwork, has become unable to serve can be removed for these reasons,

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and one who has become useless for want of work to do cannot be? The rejection of the amendments offered by Mr. Gibson and Mr. Fentress expressly negative the idea that the causes of removal should be limited to grounds personal to the official. These debates and proceedings in the Convention to which we may look (2d Ed., Am. & Eng. Enc. L., Vol. 6, 930), discloses the fact that, while a persistent effort was made to define and limit the causes of removal, the Convention steadfastly refused to do so, but left it to the discretion, wisdom, and patriotism of each General Assembly, not allowing it to prescribe in advance what should constitute cause. But the official to be removed was hedged around by extraordinary safeguards and protection. It requires more unanimity on the part of the Legislature to remove than it does to impeach. Both houses in removal cases must vote and vote separately. In impeachment cases the Senate alone votes. In removal cases two-thirds of all the members to which each house is entitled must vote for the removal. In impeachment it requires only two-thirds of the Senators sworn to sit on the trial. In removal proceedings the individual responsibility of each member is fixed and perpetuated by entering the ayes and noes on the journal. It would thus appear that no greater safeguard could be thrown around the officer concerned. It is said, with much more force and vigor than logic, that the exercise of the power of removal is violative of the Con-

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stitution, subversive of the fundamental principles of our government, and destructive of the independence of the judiciary, and an earnest protest, much in this language, was presented to the General Assembly and spread upon its minutes when the proceedings were pending. But it is plain that if the removal resolutions are authorized by the letter of the Constitution, they cannot violate that instrument. The question as to whether they are subversive of the fundamental principles of our government, and destructive of the independence of the judiciary, are questions proper to be addressed to the Convention that framed the Constitution and to the Legislature that passed the resolution, but they are not questions for this Court when the provision is plain and unambiguous. Arguments which might have been weighty and conclusive before those bodies are out of place in this Court. The question for this Court is, Is there such a provision, and what does it mean? When that is answered it must control this Court, no matter what views it may entertain of the consequences. If the power of removal exists, this Court cannot ignore it, nor refuse to recognize it, even if it be deemed hurtful or dangerous. It is difficult, in debating this question, to keep out of view considerations of public policy and welfare, and confine ourselves strictly to the point proper for us to consider, and that is the existence and scope of the power, without regard to the results of its exercise. As individuals the members of this Court

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may entertain their own convictions of the wisdom of such power, but as a Court we must lay aside such convictions and simply inquire, Does the power exist and what is its scope?

I am not able to see that the Legislature intended to limit the removal resolutions to causes personal to the official. To so hold one must read into the Constitution a provision that not only does not appear in it, but one that, after the most persistent and determined struggle, the Convention refused to incorporate in it.

In the case of *The State v. Campbell*, which we have already commented upon, the learned Judge who dissented in that as well as the Halsey case, expressed the opinion that, under the clause of the Constitution we are now considering, the Legislature might remove any judicial officer for any cause or upon any ground which in its wisdom was sufficient and proper, and the power and discretion was unlimited. He stated that it was without question the object of the Legislature in that case to rid the State of a useless officer in the interest of economy; that there were no reasons personal to the Judge for his removal, and hence the Legislature should have proceeded under this removal clause of the Constitution, instead of by the circuitous way of having the Court abolished, and said: "Upon this aspect of the case, the Constitution has left nothing to inference or deduction. The language of the clause includes all possible causes of removal known

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to the Constitution, and all conceivable causes for which a Judge or Chancellor may be removed from his office. It appears to me an anomaly to hold that the Legislature, for economic reasons, may remove a Judge by abolishing his Court, but cannot, upon the same grounds, remove him by resolution."

It is said in argument that since the clause in the Constitution provides notice to the officer, and that he be informed of the grounds of removal, that such removal can be had only for reasons personal to the Judge, after a formal trial and an opportunity to be heard, and an actual hearing by the official to be affected, and it is said that the Constitution did not contemplate such a farce as notice to an officer of proceedings, without giving him the fullest opportunity to defend against it on every available ground. Upon this feature of the case, it will be noted that the resolutions of removal recite that they were passed after hearing and due consideration. The Constitution does not prescribe in what manner such hearing may be had, or how formal the trial shall be. It will also be noted that the resolutions recite that the office of the official has become useless and been abolished. This is an official declaration by the Legislature of the existence of such cause, and must be conclusive. If we look to the journals of the General Assembly, we find that an opportunity was given to each official to be heard before the removal body upon the resolutions, both

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by himself and his counsel; that they appeared in person, or by attorney, and defended; that no further time was asked. It is said, however, that the officials were not given the privilege of examining witnesses to show that the causes of removal did not exist. It appears, however, that the facts which caused the removal were not of such nature as required examination of witnesses or production of records. The causes of removal were of a character known to all as matters of public concern, and were peculiarly within the knowledge of the legislators themselves, and all information they did not have they have obtained by means of a committee of investigation. It is admitted by the majority that if the removal could be had for economical reasons, then no evidence of trial was necessary. We may concede, therefore, that, as against many causes of removal personal to the officer, the official might defend by showing facts, but they are cases where the facts are in the keeping of the official and not of the Legislature. As, for example, if physical infirmity or mental weakness or absence from his district, or other cause of this character were the ground or cause of removal, being a matter personal to the Judge, the official may furnish evidence not accessible to legislators generally, and no doubt such evidence would be allowed to be produced; but when the facts are matters of public knowledge, about which the members could find no witnesses better qualified than they are themselves to speak, and

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which are not personal to the officer, it would be folly to take a mass of evidence that could at least be of no avail. But, so far as this case goes, the fullest and fairest investigation was had, and an opportunity was afforded the official to be heard, and in such case as this, the action of the Legislature must be accepted as conclusive, and cannot be inquired into. It is said that there is a discrepancy between the causes stated in the notices and in the resolutions removing the judges. This we consider a matter of no importance. We may concede that the Judge can only be removed for the reasons stated in the notice, and still the objection is not well founded, and the discrepancy is immaterial. The substance of the reasons stated in the notice, and the reasons stated in the removal resolution, are the same, to wit, that there is not sufficient business to require the retention in office of the official, and that it is necessary for the welfare of the State to abolish the office and remove the officer in the interest of public economy. The resolutions of removal set out reasons as grounds for removal, which was in effect a legislative adjudication that such facts existed and adds that the Court has been abolished, a fact which had not transpired when the notice was given, and which was merely supplemental action by the Legislature in pursuance of the previous adjudication. The fact that the office had, since the notice, been abolished may be treated as immaterial surplusage, the important fact being that there was

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no longer any necessity for either office or officer. It is said this is a dangerous power to lodge in the discretion of the General Assembly. Grant it. Still, the framers of our Constitution, with the light of experience and the lessons of history in their minds, so lodged it. Shall we question their wisdom? So long as the people are to be trusted and they do their duty in selecting representatives, where could it be more safely lodged? It has been a part of our organic law for sixty-five years, and we have been cited to no case of its abuse. The purpose of the removal resolutions now under consideration, is the public good and the economical administration of justice. No charge is made of any sinister purpose on the part of the Legislature towards individuals or the public. It is said it is a power that may be used to crush the judiciary, to break down its independence, and to stop the business of the judicial department. But the same object may be accomplished by other modes by the Legislature, if it shall decide to adopt revolutionary methods. It may unjustly impeach, and thus remove; it may refuse to pay salaries and expenses, and thus stop the Courts; it may refuse to provide for elections; it may, in other words, overthrow the government, because it handles both the sword and the purse. But unless such power can be lodged in the direct and immediate representatives of the people, it ought not to be lodged anywhere, and ought not to be incorporated into our organic law.

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So that, after all, these questions are not for this Court, but for the people, and in placing this control of the judiciary in the hands of the Legislature the people have drawn it as near to themselves as it is possible to draw it under our system of government.

Much has been said, and properly said, as to the necessity for an independent judiciary. There is no feature of our governmental system more vital and important, but the idea must not be pushed too far, and we must remember that, with the exception of the Supreme Court, all Courts exist as a consequence of legislative action. The number, powers, and jurisdiction, local and general, of the inferior Courts are all dependent upon the legislative provisions. The salaries of all Judges, the expenses of all Courts, are paid only in pursuance of legislative action, and, in addition, the General Assembly is given the power to impeach and the power to remove. The true theory of the government is that each department is independent in its sphere. The Legislature can enact laws without dictation from the judiciary. The latter can pass upon their validity and meaning without legislative interference. We cannot assume that either will arbitrarily disregard the rights of the other, or trench upon its province, and any argument based upon such premises is unsound and unwarranted. The departments of the government should work in harmony, as component parts of one homogeneous whole, and if each

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will accord to the other purity of motive and an earnest desire to enhance and conserve the public welfare, there will be that co-operation and singleness of purpose which will redound to the highest good of the people. The Courts have the Constitution and the statutes as charts to mark the extent of their authority. The Legislature has the same Constitution as its chart, but in respect to the Legislature the function of the Constitution is not to confer power and jurisdiction, but to limit it.

The argument that the power to abolish judicial office cannot exist, because it can be abused to the extent of destroying the entire judicial system, can have no force in the construction of the Constitution, and the possibility of abuse of power is never a valid argument against its existence. It has been properly said: "This is an argument often resorted to, and no argument is more fallacious. It assumes that if the power be one that the Legislature might abuse, and in its abuse subvert the other departments of the government, therefore the power does not exist; whereas, it is certainly true that the Legislature may, in many modes, in the exercise of unquestioned power, utterly ruin and destroy the government. The remedy, when the Legislature attempts to exercise power which it does not possess, is in the Courts, but where it simply abuses power that it does possess, the remedy is with the people." McFarland, J., in *Halsey v. Gaines*, 2 Lea, 322, 323.

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The causes assigned in these resolutions for the removal of the Judge and attorneys are entitled to the highest consideration, and, if any causes not personal to the officer involved can be sufficient, these reasons of public policy and public economy must be so regarded. It is not necessary in this case, therefore, to consider the question whether the Legislature may arbitrarily remove such an officer, whether for political or personal reasons or because a particular Judge may have ruled contrary to its ideas of law and right. No such case is presented in this record. It is intimated in the Campbell and Halsey cases that a removal, with a sinister design upon the part of the Legislature, would not be allowed. It is not necessary to consider this proposition, as it does not arise in this case. Whether the Court can revise the action of the Legislature in any case of removal, and question its authority to act upon the cause made the basis of such removal, is a grave question of much difficulty and delicacy. The Legislature could act arbitrarily quite as readily for personal as for causes of a public nature, and would more likely do so for personal causes than for those of a public or general nature. The danger of arbitrary and unwarranted action is not avoided by confining the causes of removal to personal causes. Perhaps the true rule may be stated thus: In all impeachment and removal proceedings before the General Assembly, if the causes for which removal or impeachment

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are had are such as are authorized by the Constitution, and the methods pursued in the proceedings are not contrary to those prescribed by the Constitution, the action of the Legislature is final, and cannot be questioned by this Court. If, however, the Legislature should attempt to impeach or remove for a cause not warranted by the Constitution, or should pursue methods contrary to those prescribed by the Constitution, this Court would have the power to declare such proceedings void for want of power and authority in the Legislature. If, for instance, the Legislature should attempt to impeach or remove an officer for political reasons, so specified and expressed, this Court could declare such action unconstitutional and void. I do not contend that the power of removal is unlimited, and cannot be, in any event, revised or questioned by this Court.

It is urged that this power of removal is not contained in the Constitution of the United States, nor in the Federal system, nor in the English system of Courts. This is true. The Federal system, as well as the English system, provides for a tenure during good behavior. The history of judicial tenures is not without its lesson. In England, prior to the reign of James II., Judges held their offices at the pleasure of the Crown. This power lodged in the Crown was abused to such an extent that Judge after Judge was removed, until the bench became a mere tool of the Crown. Its abuse was one of the causes of the English revolution, and in

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the bill of rights following it the permanency of judicial tenure was first secured, and it was confirmed by the statute of 13 William III., providing for a judicial tenure during good behavior, and prohibiting removals except upon the address of both houses of Parliament. Afterwards, by statute, in the reign of George III., this tenure was made to extend beyond the demise of the King, and full salaries were provided for Judges during their continuance in office. The power of arbitrary removal of Judges by the Crown was also one of the reasons embodied in our Declaration of Independence for throwing off the English yoke. In the light of these historical events, the Federal Constitution of 1787 was framed, and judges, both Supreme and inferior, were given life tenures of office, with fixed compensation, not to be diminished during their continuance in office. This system of Federal judgeships and tenure is still in force, and whatever may be said by bench and bar in its praise, the people, it may be safely asserted, are not enamored of the system, and would gladly change it. It was strongly commended by the statesmen of the revolutionary period, and by the law writers, such as Story, Kent, and Marshall of a little later date. It was followed by each and every one of the thirteen original States, and by others that came into the union soon after its formation. It was adopted in Tennessee, and under our first Constitution of 1796, judges held for life with fixed salaries. But the

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pendulum has swung back in the opposite direction, and it is a significant fact that there are only three State Constitutions in existence to-day that provide for a life tenure of Judges. It was upon this feature of a life tenure for Judges that Story and Marshall and Tucker and others wrote so eloquently, and not upon any power of removal; but their views have not prevailed, for in the great majority of the States the term is fixed at six years.

We speak of these historical facts as tending simply to show the trend of public opinion upon the subject of judicial tenures. The history of judicial tenure in Tennessee is even more suggestive. By the Constitution of 1796 Judges were appointed and held for life, with fixed salary and without power of removal. By the Constitution of 1834 they were still appointed, but for only a term of eight years, and subject to removal. By the amendment of 1853 they were made elective by the people, but the tenure of office remained the same, and the power of removal was continued, but slightly modified. It has thus been clearly manifested that the people intended to draw the Judges close to themselves, and through their representatives, as well as directly by election every eight years, exercise some control over them. This is the system now in force under the Constitution of 1870.

For the reasons herein stated I am constrained to believe that the Acts and resolutions are all valid and constitutional.

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DISSENTING OPINION.

SNODGRASS, Ch. J. This case was instituted in the Circuit Court of Shelby County, under the statutes authorizing such proceeding (Shannon's Code, §§ 5165, 5187) to restrain defendant from exercising the functions of the office of Chancellor of Part II. of the Chancery Court of said county. By bill and amended bill two questions were made: (1) That the Court had been abolished by an Act of the Legislature passed February 25, 1899, approved February 27, and defendant's term of service as Judge thereby ended, and (2) that defendant had been removed from office by a joint resolution of the House of Representatives and the Senate, adopted April 20, 1899, and approved on the twenty-first. Answer was filed denying the constitutional validity of both Act and resolution. The Circuit Judge, L. H. Estes, heard the case on the issue thus presented, and decided against defendant, enjoining him from exercising the functions and powers of Chancellor, and defendant appealed and assigned errors.

It is obvious that the judgment is incorrect if both propositions of defendant are successfully maintained, and correct if he fails in either; for if the Court is legally abolished, he could not continue to hold it, whether he did or did not cease to be a Judge, and if he has been under the resolution legally removed from office, he could not hold the Court, though it did not cease to be a Court by virtue of the abolishing Act.

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It is necessary, therefore, to consider and determine both questions. Before doing so, however, it is proper to determine one or two questions, and suggest certain consequences necessarily deducible; and, first, whether the officer can exist when the office is legally destroyed. We think that this question is not susceptible of debate. It would be an unintelligible jargon to employ words to express how an official existence was continued, when the office, the thing which was constituted only as a place and reason for such existence, was extinct. From this a consequence is deducible that, in one aspect, might make the consideration of the legislative resolution unimportant or irrelevant. If the Act in controversy was constitutionally passed when approved on February 27, defendant, Thornton, was no longer Judge, and the Legislature had no authority whatever to proceed against him for removal in any way, whether that taken was correct in form or substance, being wholly immaterial, for it will be remembered that the resolution was adopted on April 20, after the Act abolishing the Court had taken effect, which, by its express terms (not heretofore stated), was "from and after the first Monday in April, 1899." Another obvious conclusion is that if the power to remove a Judge when the office had not been legally abolished is exercised, the effect of it would only be to get rid of the particular incumbent, for, the office remaining, the

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Governor would have to fill the vacancy, and no purpose even of economy could be subserved.

In order, therefore, that the resolution could have any force or effect, it is essential to establish the invalidity of the Act; and the legislative resolution first adopted, and which was to be, and was in fact, served as notice upon the defendant, did assume (not merely, as it would be held by implication to do, when it proposed a removal from office, that the office existed) in express words that the office was then existing. This resolution was adopted on April 7, four days after the Act, if it took effect at all, had taken effect.

The resolution, which was the first in the series leading to final removal, is as follows:

“*House Joint Resolution No. 105.*—WHEREAS, The public welfare requiring the removal from office of the following named official, to wit: Lee Thornton, Chancellor of Part II. of the Chancery Court of Shelby County, Tennessee; and,

“WHEREAS, Such necessity for the removal from office of the aforesaid official arises from the reasons and causes that there is not sufficient business to require or justify the retention in office of said official; and,

“WHEREAS, It is necessary for the welfare of the State that the judicial circuits and chancery divisions of the State should be redistricted, and the aforenamed official removed from office, to the end

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that the said circuits and divisions may be properly redistricted and the public welfare subserved; and,

“WHEREAS, There no longer exists in the State any reason or necessity for the services of said official, or the continuance in office of said official, or the further continuance in existence of his said office as now existing, and the public welfare requires a reduction in the number of Circuit Judges and Chancellors and Attorneys-general in the State, to the end that a reduction may be had in the judicial expenses of the State, and for the promotion of economy in the administration of public justice, and testifying to and emphasizing the eminent abilities, fidelity, purity, and faithfulness of the above-named official in private and public life; therefore, be it

“*Resolved, by the House of Representatives of the State of Tennessee, the Senate concurring,* (1) That the Clerk of the House and Senate, each, at once make, issue and deliver to the Sergeants-at-Arms of the respective houses correct copies hereof for service upon the aforesaid official, duly certified by such Clerk.

“(2) That the said Sergeants-at-Arms are hereby authorized and directed to proceed at once to deliver to said official one of said copies, and, to carry into effect and execute this resolution, each of such Sergeants-at-Arms is authorized to appoint a sufficient number of deputies speedily to execute this order. Such Sergeant-at-Arms or his deputy will

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make return of the time at which he delivers such copy to the said official.

“(3) That in pursuance of, and in accordance with, the provisions of Sec. 6, Art. VI., of the Constitution of the State of Tennessee, the House of Representatives and Senate proceed, as therein authorized, on the eleventh day after the service of copy of this resolution upon such official, to remove said official from the office held by him as Judge of said Court, for the State of Tennessee, to this end and for this purpose that the proceedings be had and continued from day to day until finally and fully acted upon, and disposed of in accordance with the aforesaid provisions of the Constitution.

“(4) That the service of a copy of this resolution on such official shall be service of notice as required in the aforesaid section, and that the removal from office shall be for the causes stated herein.

“Adopted April 7, 1899.

“JOSEPH W. BYRNES,

“*Speaker of the House of Representatives.*

“SEID WADDELL,

“*Speaker of the Senate.*

“Approved April 7, 1899.

“BENTON McMILLIN, *Governor.*”

It has already been observed, and as is therein recited, that this was to serve as notice of the “causes of removal” contemplated by the Constitu-

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tion, and it will have been seen that it not only does not recite, or give notice of such "cause" (that is, that his office had been abolished), but it, among other things, recites that it "is necessary that the judicial circuits and chancery divisions of the State should be redistricted," etc., and that there no longer exists "any reason or necessity for the services of said official, or the continuance in office of said official, or the continuance in existence of his said office as now existing," and that on the eleventh day after the service of a copy of this resolution upon such official, the two houses will proceed "to remove said official from the office held by him as Judge of said Court." This resolution also provided that the removal shall be "for the causes stated herein." It was followed by another giving brief time for all Judges and all Attorneys-general proceeded against to be heard, but this it is not necessary to copy.

When the final resolution of removal came to be adopted, it was inserted, among other "causes of removal," that the Court had been theretofore abolished. That resolution is as follows:

"No. 56.—WHEREAS, The public welfare requires the removal from office of the following named official, to wit: Lee Thornton, Chancellor of Part II. of the Chancery Court of Shelby County, Tennessee; and,

"WHEREAS, Such necessity for removal from office of the aforesaid official arises from the

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reasons and causes that there is not sufficient business to require or justify the retention in office of said official; and,

“WHEREAS, It is necessary for the welfare of the State that the judicial circuits and chancery divisions of the State should be redistricted, and the aforementioned official removed from office, to the end that the said circuits and divisions may be properly rearranged and redistricted and the public welfare subserved; and,

“WHEREAS, There no longer exists in the States any reason or necessity for the service of the said official, or the continuance in office of said official, or the further continuance in existence of said office as now existing, and the public welfare requiring a reduction in the number of Circuit Judges, Chancellors, and Attorneys-general in this State, to the end that a reduction may be had in the judicial expense of the State, for the promotion of economy in the administration of public justice, and to this end the present General Assembly, by appropriate legislation, has abolished the Court of which the aforementioned official was the Chancellor, thus making it unnecessary that he should longer remain on the pay-roll of the State, and testifying to and emphasizing the eminent ability, fidelity, purity, and faithfulness of the above-named official in private and public life, and it appearing that notice has been given to the aforesaid Lee Thornton, Chancellor of Part II. of the Chancery Court of Shelby County, accompanied with

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a statement of the causes for his removal from office, as provided and contemplated in Sec. 6, Art. VI., of the Constitution of the State of Tennessee, after hearing and due consideration hereof; therefore, be it

“Resolved by the Senate of the State of Tennessee, the House of Representatives concurring, That aforesaid Lee Thornton be, and is hereby, removed from the office of Chancellor of Part II. of the Chancery Court of Shelby County as aforesaid, for the causes mentioned and set forth hereinbefore.

“Adopted April 20, 1899.

“SEID WADDELL,

“Speaker of the Senate.

“JOSEPH W. BYRNES,

“Speaker of the House of Representatives.

“Approved April 21, 1899.

“BENTON McMILLIN, Governor.”

It is clear, therefore, that while the Legislature could only remove if in office, and that it so recognized the scope of its power and did assume in the notice given that the office yet existed notwithstanding the Act, and that in the final resolution it inserted this cause of removal (that is, the former abolition of the office as a cause which was not specified in the notice given), and left it open to the objection that defendant was or may have been removed for a cause of which he was not notified nor had a hearing, yet this is only noticed by way

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of enforcing and illustrating other observations yet to be made upon the resolution itself, because in the view we take of it, the whole matter is immaterial; for, treating the office as not abolished, we are of opinion that the attempted removal is utterly void, for the clearest constitutional reasons embodied in the plain terms and necessary implications of the constitutional clauses bearing on that subject.

Waiving the question of the form of these proceedings—a joint resolution notifying defendant that he was to be removed as an already determined fact, and reciting in the resolution, fixing a time for his appearing, that they would then “proceed to remove him,” and of a final removal by joint resolution of the ordinary character (but of requisite majority), adopted by the two houses and approved by the Governor, when the Constitution makes no mention of a resolution for such purpose, or any action at all by the Governor, but contemplates some sort of an accusation by or before the Legislature, and a proceeding by it; of a trial, and a recorded vote of necessary majority of the members of each House, for and against the Judge, and for the purposes of the argument, treating this as a method by which the result contemplated by the Constitution could be reached—we proceed to inquire if in its substance it is a constitutional result.

The constitutional provisions bearing on the question are as follows: After making provision for the impeachment of Judges for the “commission of crime

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in their official capacities'' (Art. V., Sec. 4) it then proceeds to provide for another form of removal from office. It declares that ''Judges and Attorneys for the State may be removed from office by a concurrent vote of both houses of the General Assembly, each house voting separately; but two-thirds of the members to which each house may be entitled must concur in such vote. The vote shall be determined by ayes and noes, and the names of the members voting for or against the Judge or Attorney for the State, together with the cause or causes of removal, shall be entered on the journals of each house respectively. The Judge or Attorney for the State against whom the Legislature may be about to proceed, shall receive notice thereof, accompanied with a copy of the causes alleged for his removal, at least ten days before the day on which either house of the General Assembly shall act thereupon.'' Art. VI., Sec. 6.

It would seem clear, from the express terms of this section, that no general power was vested in the Legislature to remove these officials whenever it appeared desirable to them or for whatever reason they assumed proper, for in that event the requirement that ''cause'' or ''causes'' of removal should be entered on the journals of each house, and an official proceeded against should have at least ten days' notice of the proceedings, and of the causes of removal alleged, before either house could act thereon, would be nugatory. If it was intended to

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vest in the General Assembly the power to remove "for the general welfare," or "to subserve the public good," or "to promote economy in the administration of justice," or "to exercise the power of redistricting the State," surely it would not have been accompanied with requirement that any such official included in the provision should have notice of such "reasons" for removal, or that such notice should, by at least ten days, precede the authority of the Legislature to act in the premises. These are matters of general public concern, with which the officer has no more to do than any other citizen. They are addressed alone to legislative consideration and discretion. What answer could any official make to such an assumption of the Legislature, not to a charge against him, but the recital of a public necessity or desirability for the vacation of his place? Why give him notice, and timely notice, of a proceeding against him, for reply, when in the very nature of things there can be no reply. He cannot say, "I deny your right to determine what the public welfare requires;" he cannot say, "You cannot judge what is promotive of the public good and economy in the public service or whether the State needs redistricting." These are all suggestions made to him, and made not only with the knowledge that they are not issues tendered which he can accept, and on which he can make a contest, but they are the recital of assumed conditions not susceptible of outside contest, because addressed alone to the wis-

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dom and discretion of the Legislature. And the Legislature did not do its intelligence the injustice to pretend to think differently on this subject, for it did not invite the official to contest them. It assumed and assured him in the notice that they were settled and that he was merely notified that he, because of their existence, would be removed. He was not invited to a trial, or to take issue on a "cause" of removal averred against him in a proceeding instituted for cause, and which he might show did not exist. He was merely notified that certain "reasons" for his removal existed in the judgment of the Legislature, which alone could determine, not on evidence necessarily, but as the legal representatives of the people vested with power to entertain and determine them as matters of pure discretion. So that it comes to this, either the two houses of the General Assembly have, upon the requisite two-thirds vote, the power of removal without cause, and at their unlimited discretion, or they have no such power, however they attempt to exercise it, and their action is open to objection whenever and wherever the right of the official is taken away without cause personal to himself. But here it is urged that, granting there must be cause personal to the official, such as unfitness, incapacity, neglect of duty, or want of moral character, or immoral conduct, or other causes justifying removal, and which can be charged against him, and on which charge he can take issue and offer evidence, still the Legislature is

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the final judge of what the cause or causes are, and that they have settled it in this case. This being so, it is argued, even though they were wrong, there is no remedy. This specious and plausible argument is wholly unsound. If a "cause of removal," like a cause of impeachment, had been presented and tried and determined by the Legislature, though erroneously, its action would have been final. But before it can become so there must be a proceeding such as is contemplated in the Constitution. There must be an issuable averment of a *bona fide* cause of removal which may be traversed, and, before the just legislative judges, may be successfully met or established; until this is done there has been no legitimate action by the Legislature, and this, like all other acts, is subject, on this ground, to the reviewing control of this Court.

We come, then, to the merit of the argument that "cause of removal" means anything the Legislature may assume to be such, which is pressed with great urgency upon us. We are told that the Legislature might remove because a Judge, acting in good faith and with most loyal convictions of duty, had decided, or was about to decide, a case a particular way, and the argument is enforced by the illustration that if the Legislature of 1881, existing when this Court passed adversely on that Act, had concluded that the noted statute (called the 100 and 3 Act) was about to be declared unconstitutional, it might have resolved the prospectively offending Judges

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of this Court, singly or as a body, out of office, under this provision of the Constitution, or that it might have done so afterward if it had been so disposed, and thus have wreaked its vengeance on the Court or any of its members for doing its constitutional duty, but adversely to the legislative will. The argument is not strained. If it be a sound precedent position that the Legislature has unlimited power of removal for any "reason" it treats as a "cause" of removal, it was in its power to have removed that Court before that decision and had it reconstituted by an executive favorable to the measure, and it was in its power to have removed its members after the decision for no other cause or reason than that they did their duty as they saw it in the fear of God, and, as it happened, in the favor of the public. The State is much pressed for reasons when it must rely, to sustain the legislative action and uncontrolled legislative authority over the judicial department, upon argument which leads to such monstrous conclusions as this. Instead of having a sensible Constitution, sustaining in all its parts, by plain words and necessary implications, three distinct, independent departments, we would have one which made the judicial so dependent and so humiliatingly subservient that its personal representation would be in the unrestrained hands of the legislative department—its overawed ally or its cringing dependent in every contest on great questions of public interest, or in the wild outbreaks of public passion. The Judges of

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the several Courts, too, would be under a far more despicable subserviency. From term to term of the Legislature, recurring every two years, they would be fighting for existence against the strife of politics, the demands, real and fictitious, of economy, and the claim of each agitator of retrenchment in the name of reform. They would be forced to defend against the antagonisms of local enemies, disappointed suitors, and desperate victims of their administration of law. Lives would be made intolerable in anxieties and apprehensions to the good and the well-meaning men of the inferior Courts, while they would be made existencies of crawling shame to the weak or willing tools who yielded to such domination. This is the consequence if the "cause of removal" in the Constitution means anything assumed to be "reason" for removal by the Legislature, or if its assumption of "reason of removal" as "cause" is not disputable in the Courts.

To give the Constitution its plain meaning, no such condition can result. No honest Judge can fear or need fear legislative deprivation of office "for cause." He will give no just cause, and he can trust any body of legislative Judges to shield him from the shame to itself of robbing him of his rights, in a trial where an issue must be made as to his conduct or character, and where in open day the public must see him condemned and hear his sentence. But if the Constitution be so construed as to mean that it is all a matter of legislative discre-

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tion, and how long he shall exist, and for what reasons he shall go, are questions for the Legislature as his superior to determine, then the Constitution is no protection to him, and a legislative Act is not objectionable, though it remove and destroy him, if it may be done under the properly construed provisions of the Constitution. The record itself could always be made to wear the appearance of sanctity; the proceeding could take on the robe of economy or the garb of piety, and the work be done "properly," being done under the Constitution. Nevertheless the Judge would be, instead of a distinct, independent servant of the people by whom he was elected (and by all of whom he was elected, as the individual members of the other departments were not), an easily destroyed victim of legislative disfavor, without independence in his place or his conduct, and without protection under the Constitution and law he was created to construe and sworn to enforce.

It is said, however, that the constitutional provision for removal is not to be for "specific" cause, and it is, therefore, assumed to be for "any" cause which the Legislature may elect to so treat, and going a step farther, that any "reason" the Legislature gives must be treated as "cause," if they so treated it, because the Constitutional Convention of 1870 rejected certain amendments which were offered, attempting to specify particular "causes" of removal in the constitutional provision, or to re-

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quire their specification by law; and on this point the journal of the Constitutional Convention is quoted, and likewise the argument (made in this case in the Court below) of a member of the Constitutional Convention, and later Attorney-general of this State, referring to the journal of the Convention, and also to his scrap-book of the daily papers, showing more to the same effect. In that argument it seems, by reproduction here, that several eminent men yet living, who were also members, had views antagonistic to his of what took place in the Convention on that subject, and of the intent and purpose of the Convention, as indicated by expression of sentiment. All this disagreement of recollection and controversy as to views are reproduced here in argument, and much of it printed in the briefs. It only is sufficiently important as evidencing the views of good and worthy men who figured in that great work to justify its statement. It is really a mere word playing now. Whose memory as to those proceedings is good or bad, and with which one time has dealt most hardly, is of no consequence. Both from the plain reading of the Constitution itself, as well as from the journal and from the newspaper account (treating it as verity) it appears that "cause" of removal was required. "Cause" which must be specified to the accused or "proceeded against" official, and to which he must have ten days to get ready, and against which he could defend. This is all clear. It only makes it

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the more so, and the more materially so on the construction that can alone be properly placed upon it, that none of the Constitution makers undertook to eliminate the word "cause" or "causes" of removal already in the section. No amendment was offered to change or strike it out. The Convention refused to specify or provide for the specification of particular causes, and rejected all efforts to do so, by amendments, because there would be many covering possibly impeachable, and certainly nonimpeachable offenses, and other faults and conditions not susceptible of easy enumeration, and for the same reason not deemed proper to be reduced by special classification or limitation on the general terms employed. Having said that the officials might be removed for "cause," and only for "cause" as is absolutely implied as shown, and having set forth that it was to be for cause assigned in a proceeding against the official, where there was to be a triable issue, which could be met by defense; and to get ready for which he was to be notified sufficiently in advance, and having set forth that in that proceeding or trial, and upon the causes for removal charged and entered of record, there were to be votes in both houses for and against the official on these charges, the convention manifestly deemed it had done enough to require a proceeding on personal causes of removal, and as there might be a great many of them, would not and did not limit them in number or character by

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indication or enumeration of a few, or by a specific limitation on a general statement. This is all there was of it, and it is matter of surprise that it should be used for more, or to prove the very thing it in fact disproves.

But the argument is made that this wholly baseless view finds support in the fact that the removal clause of our Constitution is borrowed from the English law, under which a Judge might be removed on address of Parliament, and that in States where this unlimited consequence is not to follow, it has been guarded against by specifying for what "causes" removals may be made.

It is not true, in the first place, that the proceeding is so borrowed. It is not the English proceeding. There, on such "address" the King could remove. In some of the American States this was almost immediately copied. The Legislature could address the Governor and he could remove, as the King in England. But no such course was taken in our Constitution. The Governor has nothing to do with removal. Again, in England the removal might be with or without cause (if Parliament, which was omnipotent, so willed, and addressed) because Acts of Parliament practically make what is farcically called the Constitution of England, for they have no Constitution in the sense that we have, or in any other except theoretically, but our Constitution, which is written, fixed, and permanent, left no such scope for the removal of Judges. It gave only

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the power of removal to the Legislature, coupled with condition that it must be for cause, for cause of which notice must needs be given, and to which there could be defense, and, of course, successful defense, interposed, for no American lawmaking body ever yet went through the form of calling a citizen to a trial, requiring that he should have notice, and yet cut him off from a trial or defense that might be successful, that was intended to be successful, if made out. It is therefore not true that any support of this legislative resolution is derived from its English semi-prototype or the contemporary constitutions of this country. Some of the latter in terms specified what the "causes" should be. Some said for any or certain ones not sufficient to amount to impeachable causes, but no single one ever required a "cause" to be assigned, as ours does, which did not mean one personal to the Judge to his acts, habits, or character. No one ever did recognize as "cause" anything over which he had no control, or which did not have personal relation to his discharge of duty, and no single case can be found to the contrary.

Having devoted so much space to this question because of its supposed serious and final effect on what was concededly a doubtful result, so far as the Acts abolishing the office of Judges were concerned (for the resolution of removal was treated, legislatively, as a method to "clinch," as was there said in argument, the abolishing Act), we come to

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that question and proceed to its consideration with the elaboration it deserves, at the risk of being tedious, for the question is one of the most important that ever arose for final decision in this State, and upon its determination hangs, as we think, not only the independence but the existence of the judicial department of the State government. As already stated, our government, State and national, is divided into three distinct and independent departments, legislative, executive, and judicial. Such, too, is, in substance, the divisions of all the other State governments, and it may well be practically termed the form which republican governments have taken in these United States, and which the Constitution thereof guarantees to every State in the Union. (Art. IV., Sec. 4.) Our own Constitution, based on that, and substantially that original of 1796, which had Mr. Jefferson's commendation as one of the best ever framed, after providing that "all power is inherent in the people," proceeded to declare how the people would have it exercised, to distribute into departments and to vest in each such as the people wished each to exercise, and to put upon each the limitation which was deemed essential to confine it within the scope of the authority the people vested, and beyond which they intended to restrain. It is sometimes said that the Legislature is omnipotent and its authority unlimited, except when restrained by the Constitution of the State or the Federal government. It is treated as a great residuum of power not other-

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wise constitutionally disposed of or restrained. This is *sub modo* true, generally, in the cases in which it has been uttered, but it is wholly inaccurate when given the general application to which its formulation would lead. All that is meant by it is that, following the English rule as to parliamentary power, the Parliaments or Legislatures of the States of the Union, as legislative representatives of the people, have all legislative power, not expressly or by necessary implication limited, that the English Parliament did. *Smith v. Normant*, 5 Yer., 272-3. So far as this question is involved here, it may be dismissed with a mere suggestion. The power of creating or abolishing Judges never did, and does not now, abide in the Parliament of England. The English theory was that the King was the Judge in England. Later this kingly power was delegated by him to others appointed by him. They existed with him (subject to his power of removal) and officially died with him, if not before removed. Yet later, on recommendation of the King, the last feature was changed by Act of Parliament, and the tenure of the office of each incumbent was extended beyond the death of the King, and the office was ultimately held during good behavior, which, of course, meant during life, if not forfeited by misconduct. But still to this was added a right of removal by the King upon what was termed an address of both houses of Parliament, and which, it

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is said, was made in the form of a resolution. Enc. Br. (9th Ed.), Vol. 13, 763.

Never, therefore, did the power of appointment or removal of a Judge vest in the Parliament of England. It was not a legislative power there, and is not here, unless the people have made it so. If it was a legislative power, and was not constitutionally limited, it would remain a legislative power. If it was not, and was never made so constitutionally, it would remain in our system one of the powers amid those all of which are "inherent in the people," and not to be exercised except as they organically will it to be.

It is necessary, therefore, to see what our Constitution provides on that subject, and how it regulates the creation and abolition of Courts. Without going on this question beyond our present Constitution, except for the purpose of illustrating the view of the public, we would call attention to other utterances of the people as indicative of the purpose they had and the proper construction of the view expressed in that Constitution. It will be remembered by all students of history that the course of dependent Judges, rendered truculent by control and made infamous by subservience, had created for the English people a more insupportable condition of legal tyranny and authorized oppression than had ever found existence in the wildest usurpation of pretenders or the most abominable license of established despots. This, among all the grievances which

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caused revolution and advanced the cause of freedom there, and gave it absolutely here, was the result of such disregard of popular rights and liberties by dependent creatures of the Crown called Judges. It is to be remembered that one of the complaints of the American colonies against the King was that "he has obstructed the administration of justice by refusing his assent to laws for the establishment of judiciary powers. He has made Judges dependent on his will alone for the tenure of their offices, and the amount and payment of their salaries." Dec. Ind., 8th and 9th complaints. When the struggle for independence under this declaration was successful, and a form of government came to be adopted, these evils complained of were remedied.

An independent judiciary, in an independent government, was secured by constitutional provisions giving a fixed tenure of office and prohibiting a reduction of salary. In the federal government the tenure was for life (or what may be the same thing, and must be, to a faithful and irreproachable official), during good behavior, and there was a provision against decreasing judicial salaries. In the Constitution of this State the same course was taken, with an improvement, at least in one respect. The tenure was fixed, not for life, but fixed at eight years, and the provision against decreasing was extended to prevent increase of salaries. Specifically our Constitution provided on this subject that "the powers of the government shall be divided into three

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distinct departments, the legislative, executive, and judicial." Art. II., Sec. 1. "No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." Sec. 2.

After thus distributing the powers of government into these three distinct and independent departments, the people in this Constitution proceeded to vest them, so far as the question now involved is concerned: "The judicial power of the State is vested in one Supreme Court and in such Circuit, Chancery, and other inferior Courts as the Legislature shall from time to time ordain and establish, in the Judges thereof and in Justices of the Peace. The Legislature may also vest such jurisdiction in corporation Courts as may be deemed necessary. Courts to be holden by Justices of the Peace may also be established." Art. VI., Sec. 1. "The Judges of the Supreme Court shall be elected by the qualified voters of the State. Term of service shall be eight years." Section 3. "The Judges of the Circuit and Chancery Courts and of other inferior Courts shall be elected by the qualified voters of the district or circuit to which they are to be assigned. Term of service shall be eight years." Section 4.

"The Judges of the Supreme or inferior Courts shall, at stated times, receive a compensation for their services, to be ascertained by law, which shall

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not be increased or diminished during the time for which they are elected." Section 7.

This fixed tenure of office and unchangeable salary were the methods devised to secure judicial independence, as they have ever been in the American Constitutions. The provision vesting judicial power, among other Courts, in Circuit and Chancery Courts, was intended to preserve (whatever else might be added) the system of Circuit and Chancery Courts. So was and is its plain purport. In like manner it has been held to be the constitutional object to preserve the County Court as a part of our Court system upon like recognition, but in yet other sections of the Constitution. *Pope v. Phifer*, 3 Heis., 683.

These three Courts thus recognized as preserved by the Constitution, in addition to the Supreme Court, have been protected in theory since the adoption of the Constitution, always and in all opinions. They have been in fact protected in all the cases up to 1875, notably and powerfully in the Pope case in 3 Heis., 683. Like other constitutional offices, it has been held that legislative control of their existence must be denied, and that, even as to duration of their terms, the legislative power could not be exercised.

In 1875 it was held that, though true in theory that Circuit Courts and Chancery Courts must be maintained, it was not so in fact—the Legislature could abolish any it chose. *Coleman v. Campbell*,

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3 Shan., 355. Of course if it could abolish any, it could abolish all, as it was not and is not pretended that any one or more of them enjoyed a special immunity from legislative control.

This case was based upon the theory that the power to establish involved necessarily the power to abolish—a theory wholly inconsistent with the constitutional provision for the establishment and continuance of the Circuit and Chancery Court system. For if one or both is “established” it can and “shall” exist or have jurisdiction vested in it under the Constitution, and thus be kept alive and preserved, against legislative power, as a part of the Court system, as a constitutional Court, but if the power to establish includes the power to destroy, such cannot be the result, and there is no protection to either Circuit or Chancery Court system thus recognized and attempted to be preserved and protected by the Constitution. It happened that in the particular case cited (*Coleman v. Campbell*) and case heard with it (*Verene v. Williford*) the Courts, as well as those preceding them, Circuit and Chancery, had been created by special Acts, so that, dealing with them, Judge Nicholson said: “If the Legislature had the power to enact the law, it must be either because the ordaining or establishing of Courts is a legitimate legislative power necessarily involving the power to abolish as well as to ordain and establish, and that the Constitution has placed no restriction upon the exercise of this power in-

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consistent with the action of the Legislature in the present case, or because the Constitution, expressly or by necessary implication, has vested in the Legislature the power to ordain and establish Courts, and that this power carries with it the power of abolishing existing Courts."

Taking this proposition, which was the question in issue, for granted, the Judge delivering the opinion proceeded to the conclusion that necessarily the Legislature could abolish and could establish, but, by the Constitution of 1870, it was prohibited from disregarding the provision to establish Circuit and Chancery Courts, and must keep those systems in existence in connection with any other inferior Courts it might establish. That this conclusion is so incorrect, not to say transparently erroneous, as to be perfectly demonstrable, appears from the simplest statement. If the Legislature must preserve Circuit and Chancery Courts and yet may abolish them; if it is true also, as it constitutionally is, that it may also establish other inferior Courts and vest in them such jurisdiction as it chooses, why could it not abolish all Circuit and Chancery Courts and then establish other inferior Courts in whom it might vest all inferior jurisdiction? Who would say, and what (but the Constitution) could say how many, if any, Circuit Courts or how many Chancery Courts, if any, it should preserve? It is so clear that the power to establish does not include, as against this preservative provision of the Constitution, the

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power to destroy any or all of them, that it is wonderful to us that the contrary view could have ever prevailed for a moment. To say nothing of the provisions which make constitutionally the term of all the Judges of all these Courts eight years, and prevent changing their salaries during the time for which they were elected, it seems so manifest that the power to destroy one or all of those Courts, when created, is against the preservative clause of the Constitution respecting the Circuit and Chancery Courts as only to need suggestion to demonstrate its nonexistence. If the Legislature can abolish one, it can abolish all. Which shall it re-establish, and how can it be required to re-establish any one of them, and if so, which, especially in view of its power to establish other inferior Courts and vest them with any jurisdiction it pleases?

It is a vain thing to say it can abolish as it pleases, but must retain or recreate the same tribunals. The concession of the power to abolish one, coupled with the declaration of constitutional necessity for the retention of the system (which the Court holds in that case must be done), is a patent impracticability, not to say absurdity.

The only argument for the preservation of the system is its constitutional establishment over and against the power of the Legislature to abolish it when established during the existence of any term. It is not a question of trusting the Legislature not to do it; it is a question of its power to do it

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against the positive provision that these Courts must exist by the preservative clause vesting in them the jurisdiction when created. No other conclusion meets this difficulty, and no argument has been made or could be made which obviates it. We would just as well say it must exist, but may not exist, as to assert the proposition contended for, or put two and two together and say they shall not make four, as to assert that the Constitution preserves this system of Courts against the power of the Legislature, and then say it may destroy it by destroying the Courts severally or *in toto*. The principle herein contended for was conceded by the same Court which decided the Coleman case, and still that case was in part adhered to in *Halsey v. Gaines*, 2 Lea, 316, 319. In that case it was conceded (page 326) that an Act abolishing a circuit with intent to destroy a Judge would be void.

This concession can mean nothing else than that an Act destroying a Judge by abolishing a circuit or division, would be void, because it had been before, and has repeatedly since been, decided that the personal motive or intent of the Legislature in passing an Act cannot be inquired into, and the only intent which can be considered is the legal one determined by the effect of the Act. If the Act is to destroy the Judge, the intent appears and the Act is void. If this is not so, the concession is meaningless and misleading, not to say frivolous.

For almost the same reasons are the other infe-

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rior Judges protected from legislative interference. They are to be men of the same age, the same term of service, with the same unchangeable compensation, and elected by the same voters in the same district or circuit where they serve. Art. VI., Sec. 4. The word "district," it must be remembered, was once (and then) used for the county or counties embraced in a section where one Court was held for one or more counties. Hence our old statutes referred to a chancery district, one of them providing that certain bills should be filed in the chancery "district," etc. The manifest constitutional object was to permit the establishment of Courts for any circuit, division or district composed of one or more counties, or specific territory, and then make their existence during a term equally inviolable for such term, and to secure both and in the same way the compensation of the Judge was to be unchangeable, not during any "term of service," but "during the time for which he was elected." To this conclusion this Court came in the case of *State v. Leonard*, 2 Pickle, 485, and we used language there which we thought could by no possibility be misconstrued. In this connection we said:

"The Constitution, in fixing the terms of the Judges of inferior Courts elected by the people, at eight years, intended not only to make the judiciary independent, and thereby secure to the people the corresponding consequent advantages of Courts free

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from interference and control, and removed from all necessity of being subservient to any power of the State, but intended also to prevent constant and frequent experimenting with Court systems, than which nothing could be more injurious or vexatious to the public.

“It was intended when the Legislature established an inferior Court, that it should exist such a length of time as would give opportunity for mature observation and appreciation of its benefits or disadvantages, and that the extent of its duration might discourage such changes as were not the result of most mature consideration. Realizing that a change, if made so as to constitute an inferior Court, would fix that Court in the system for eight years, a Legislature would properly consider and maturely settle the question as to the propriety and desirability of such change or addition to our system, and conscious of the impropriety and the hazard of leaving the judicial department of the government at the mercy and whim of each recurring Legislature, itself elected but for two years, the framers of the Constitution wisely guarded against these evils by the section referred to. Properly construed and enforced it is effectual for that purpose. Disregarded or impaired by such interpretation as leaves it to exist in form, without force or substance, and we have all the evils and confusion of insecure, changing and dependent Courts, frequent and constant experimenting with systems, provided in haste, tried in

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doubt, and abolished before their merits or demerits are understood. It would be a mortifying reflection that our organic lawmakers intended any such result in their avowed effort to make a government of three distinct and independent departments, and still more humiliating if we were driven to the conclusion that, while they did not intend it, they had been so weak and inapt in phraseology adopted as to have accomplished it." When a Court whose Judge is elected by the people of one or more counties in a district or circuit is constituted by the Legislature, and an election had, and the officer commissioned and qualified, it is not in the power of the Legislature to take from him the power and emoluments of office during the term of eight years by devolving them intact upon another, or otherwise. If it can abolish in this way the office of County Judge, it can abolish the office of any inferior Judge, as all are protected, or not protected, by the clause of the Constitution referred to (Art. V). For the honor of the framers of our Constitution, the best interests of our people, the independence of the judiciary, and the security and order of our Court system against rash and constant experiments of legislation, it affords us much satisfaction to give the Constitution its plain, natural, and unobscure effect to invalidate legislation of this character, and to be able to say that nothing as yet decided by our Court stands as an obstacle in the way of our doing so. But if there were, it

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would afford us pleasure to remove it." *State v. Leonard*, 2 Pickle, 485.

The cases supposed to stand in the way were *Coleman v. Campbell* and *Halsey v. Gaines*, and, after saying that we did not wish to be understood as assenting to the correctness of the conclusion reached in them, and rejecting their reasoning, we showed that, though erroneous, they did not need to be in terms overruled, because the exact question of the Leonard case was not decided there, but we wholly repudiated them, and gave the Constitution an opposite construction.

Giving the Constitution this construction harmonizes the entire section quoted, makes the judiciary department in fact, and not merely in fiction, independent, and harmonizes all the other cases before and since on this subject. See *Smith v. Normant*, 5 Yer., 270; *Pope v. Phifer*, 3 Heis., 682; *State v. McKee*, 8 Lea, 128; *Crass v. Mercer*, 16 Lea, 486; *Rembo v. Maloney*, 8 Pickle, 68; *State, ex rel., v. Cummins*, 15 Pickle, 674.

It had been before, as was in the Leonard case, decided, that when the Constitution fixed a term, if the Legislature created the office and abridged the term, that part of the Act creating the office was valid, but the abridgment was void. *Brewer v. Davis*, 9 Hum., 208; *Keys v. Mason*, 3 Sneed, 9. This was repeated in the Leonard case. It was before this, but later than the Coleman case, decided that a legislative Act which might destroy a

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Judge's right to hold his office was inoperative, although the Judge was neither a Circuit Judge nor Chancellor. *State, ex rel., v. Ridley*, MS., Nashville.

And yet later it was, we thought, affirmatively and forever settled in the case of *State v. Cummins*, 15 Pickle, 674, where we held that if the Constitution merely named an officer (as Sheriff) without defining his duties, it was impossible to destroy his office, or take from him the substantial emoluments and functions of the office and confer them upon another on any pretext whatever. This case proceeds upon the same grounds and cites the same authorities which controvert the view of the Court in *Coleman v. Campbell* and *Halsey v. Gaines*.

It should be noted here that all the cases in this Court have gone upon the theory generally recognized in the American Courts, that when the Legislature makes or creates an office without a tenure, or independently of constitutional provision, it can abolish it, or change its tenure or its compensation at pleasure, but that when it creates a constitutional office, that is, one directed or authorized under the Constitution or recognized by it, and for which the Constitution has provided a tenure, the Legislature cannot abolish the office, abridge its term, or destroy its substantial functions or emoluments. 12 Am. & Eng. Enc. L., 18, 19. We quote in full:

“It is a general rule that when an office is created by statute it is wholly within the control of the Legislature creating it. The length of term and

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mode of appointment may be altered at pleasure, and the office may be abolished and the compensation taken away from the incumbent, unless forbidden by the Constitution. There is no vested right in an office against the public. The Legislature may abolish a judgeship where the right to the office is not secured by the Constitution. Nor do public offices constitute contracts, protected as such from violation. And even though a Judge's office be created by the Constitution, if his tenure and compensation are left to the Legislature they may control and alter in these respects, saving that they cannot virtually abolish the office as under pretense of reducing or taking away compensation. The Legislature in such cases is moreover bound to respect an intendment of the Constitution that Judges shall be elected. It cannot, in effect, do away with this right of the people by making terms of unreasonable length. The Legislature has no more power to enlarge a judicial term fixed by the Constitution than it has to abridge the same.

“Abolition or change of Courts: The tenure of the office, as has been already stated, does not rest on contract, and is not protected by the contract provision in the United States Constitution. The General Assembly cannot, directly or indirectly, abolish any ‘constitutional office’—that is, one whose tenure is defined by the Constitution; but it may, directly or indirectly, abolish any ‘legislative office’—that is, one created by the General Assembly itself.

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But the power of the Legislature to alter the territorial jurisdiction of Justices of the Peace necessarily arose from the power to create new counties; and out of the legislative power to reorganize and regulate the Courts grows the power to divide a judicial district or to diminish the aggregate duties by creation of an assistant. But the Legislature cannot take away altogether the authority of a Judge, the grant and tenure of whose office are fixed by the Constitution. Modifying a judicial office in regard to titles and duties and continuing the former official in the new Court, is not depriving the officer of his office." Citing cases from Virginia, Louisiana, Illinois, New York, Pennsylvania, Arkansas, Minnesota, Ohio, Wisconsin, Nevada, Iowa, Michigan, Missouri, Massachusetts, and North Carolina.

Nothing is better settled in this State at this time than this proposition. It is equally well settled that the Legislature may, as in the Sheriff's case we held (*State v. Cummins*), diminish or increase the duties, and in the case of Circuit, Chancery, and other established inferior Courts it may diminish or increase the jurisdiction, enlarge or contract the territory of their work, but it cannot destroy either the officer or the office *in toto*, and it cannot, therefore, abolish a circuit or chancery division, because that would destroy the Judge. The line must be drawn somewhere. We undertook to draw it in the Cummins case. We had before decided that duties could be changed and compensation could be

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changed. The Constitution said the office must exist. It gave no salary and defined no duties. If the line was not properly drawn, the constitutional office meant nothing, because we had held it might be made to carry limited or enlarged burdens and be compensated by greater or less fees. If we said it should carry no burden, discharge no duty, and receive no compensation, the constitutional office was a farce which construction had destroyed. There must be a line, a reasonable line, drawn somewhere, which permitted the law to regulate the office but recognized and continued its constitutional existence. We drew the only one possible.

It applies in the same way to the Judges. The legislation has been the same. The Constitution is even more specific as to them, for it directs the vesting of jurisdiction, and requires a fixed territory for service and an unchangeable compensation. The rule is the same—must necessarily be the same; legislation may increase or diminish the jurisdiction of constitutional Judges; it may add territory or take it away, but it cannot take all jurisdiction or all territory away. Enough must be left to preserve the substantial jurisdiction and functions of the office. Nothing less than this is reasonable to the law; nothing more is agreeable to the Constitution. To show how clear this is from another standpoint, we consider what appears in the Constitution as to the Supreme Court and our construction of it. The Constitution says our jurisdiction shall be appellate

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only, "under such restrictions and regulations as may be from time to time prescribed by law." Art. VI., Sec. 2.

Under this clause we have recognized the right of the Legislature to take from us and confer on other Courts (notably the Court of Chancery Appeals) certain jurisdiction. But we did not mean, the Constitution could not mean, that the Legislature could take it all away. If so, there need be no Supreme Court. Here, too, the line must be drawn. We must have jurisdiction. The Legislature may reasonably limit; it cannot, therefore, destroy. If so, it can destroy this Court. The Cummins case declares the sound principle on which all constitutional offices must be sustained, and upon it the Courts with all others. There is no principle of general law proportioned according to name or importance of the office. One rule must prevail. We had in this State two cases apparently to the contrary, *Coleman v. Campbell* (1875) and *Halsey v. Gaines* (1879). During the reconstruction period, from 1865 to 1870, an Act was passed creating certain Courts and another abolishing them. These cases arose on construction of the last Act. They in principle were contrary to preceding cases cited in this opinion, and the reasoning upon which they were based was directly rejected and repudiated in the Leonard case already quoted. In the Leonard case the Court announced that it was not necessary to overrule them, as the Leonard case was not the

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same, but every line of it was in hostility to the theory on which they were based, and in conclusion of that case it was announced that if it had been the same they would have been overruled. They were not in terms overruled then, because, not being identical with the case considered, they could not be, but their doctrine was repudiated, as it has been throughout the United States whenever similar constitutional provisions were involved. See cases cited in reference to 12 Am. & Eng. Enc., pp. 18, 19, from many States. And see, especially, *Commonwealth v. Gamble* (Pa.), 1 Am. Rep., 422; *Reed v. Smoulter* (128 Pa.), 5 L. R. A., 517, 534; *Fant v. Gibbs*, 54 Miss., 396; *State, ex rel., v. Friedly* (Ind.), 21 L. R. A., 634; *Foster v. Jones*, 52 Am. Rep., 638; *People v. Dubois*, 23 Ill., 547; *Attorney-general v. Jochim*, 23 L. R. A., 703; *State v. Messmore*, 14 Wis., 177; *Ex parte Meredith* (Va.), 778; *Hoke v. Henderson*, 25 Am. Dec., 675; *King v. Hunter* (N. C.), 6 Am. Rep., 754; *State v. De-Gunther* (Wis.), 7 Am. Rep., 89, note; 7 Lawson's Rights & Remedies, Sec. 3817, note; Throop on Public Officers, Secs. 19, 20 (Mr. Throop cites a Louisiana case as authority to the contrary in Sec. 20—*State v. Wilts*, 11 La., 438—but this ruling is reversed—38 La., 861—as appears by citation in 12 Am. & Eng. Enc. L., p. 19, note 4); Cooley on Con. Lim (6th Ed.), p. 80.

All the cases, so far as they are to be found not herein cited, will be found in notes to sections

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in 12 Am. & Eng. Enc. L., cited, and in the briefs of counsel and citations of the Courts and in notes to cases referred to in American Decisions and Lawyers' Reports Annotated. It is confidently asserted that no direct case can be found, outside of Tennessee, on precisely similar constitutional provisions, going as far to sustain legislative action in abolishing Courts as the Tennessee cases of *Coleman v. Campbell* and *Halsey v. Gaines*.

As supposed to the contrary of this great weight of authority four cases are cited. They are *Aikeman v. Edwards*, 30 L. R. A., p. 149; *Crozier v. Lyons*, 72 Iowa, 401; *Van Buren Co. Sup. v. Mattox*, 30 Ark., 566; *Hoke v. Henderson*, 25 Am. Dec., 627.

In the case of *Aikeman v. Edwards*, 30 L. R. A., the question as to the power of the Legislature to interfere with a judicial tenure of office was not involved. Butler and Greenwood Counties composed the said twenty-sixth judicial district. The Legislature transferred these counties to the thirteenth district, thereby indirectly abolishing the twenty-sixth district. The Act providing for transfer of jurisdiction also provided that it should not be construed so as to deprive any Judge of his salary. After the passage of this Act, Aikeman was nominated in a party convention as a candidate for the office of Judge of the said twenty-sixth district, which had been abolished by said transfer of its jurisdiction. A certificate of his nomination was given him by the chairman and secretary of the convention, which was by him pre-

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sented to the Secretary of State, with the request to file the same. This request was refused by the Secretary of State, on the ground that the said two counties composing the twenty-sixth district had been by said Act transferred to the thirteenth district. Thereupon, Aikeman sued out a writ of mandamus to compel the issuance of the certificate. The relator had no claim or right to the office. His contention was based upon the broad proposition that the Legislature had no power to abolish a circuit by transferring its jurisdiction to another circuit, and that, this being so, the office of Judge of said circuit was still in existence. Upon this contention he claimed the right to become a candidate.

The salary of the Judge incumbent having been preserved by the Act, and said incumbent Judge making no contention, the sole question before the Court was whether the Legislature had the power, under the Constitution, to abolish said circuit, by transferring the counties composing it to another circuit. The Court, in its opinion, distinguished the case from one involving the right of an incumbent Judge, saying: "We might say, in this connection, that the plaintiff in this does not claim any vested right in an office, and that no question is presented by the record before us as to the right of the Legislature to deprive a district Judge of the compensation allowed by law. In the Act under consideration, the Legislature has seen fit to provide that the Act shall not be construed to deprive any Judge

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of his salary for the full term for which he was elected. The claim of the plaintiff in this case rests on the broad proposition that the Act in its entirety is void. We need not discuss the question, argued at some length in the brief, whether there can be a Judge without a district, or without a Court over which to preside, as the plaintiff in this case has no interest in that question." 30 L. R. A., 153, 154.

The Act in question abolished four districts by transferring their jurisdiction to other districts. As is shown in the opinion of the Court, this was done upon economical grounds, and to dispense with extravagant and useless Courts. The fact that, under these circumstances, the Legislature reserved to the Judges of the abolished Courts their salaries for their full terms of office, furnishes the evidence that the Legislature considered that the Act would be unconstitutional unless such reservation was made. The Constitution referred to in this case provided that Judges should hold their offices for a term of four years. But it must be admitted that the opinion of the Court indicates that it intended to maintain the view for which it is cited. We have pointed out, however, the facts and different constitutional provisions.

The case of *Crozier v. Lyons*, 72 Iowa, 401, has no bearing upon the question in the case at bar. The Constitution of Iowa (1857) provided that the judicial power should be vested in a Supreme Court,

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District Court, and such other Courts inferior to the Supreme Court as the General Assembly may from time to time establish. It further provided for a fixed term of office as to the Judges of the Supreme Court and District Court, and for an undiminished compensation during the term for which they were elected. It further provided for the reorganization by the Legislature of judicial districts and an increase of Judges of the Supreme Court, but that this should be done so as not to remove a Judge of said Court from office. As to inferior Courts which were not embraced in the classes of Courts before named, said Constitution contained no provisions for a fixed tenure of office, nor for an undiminished compensation during continuance in office, nor any prohibition against removal from office. In law the prohibition in said Constitution against removal from office of one class of Judges conferred the implied power to remove the other class—the Judges of the inferior Courts constituting said class. It will be seen from said Constitution that the class of Courts designated in the same as inferior Courts were intended to be creatures of the Legislature, subject to its will, and for this reason no constitutional limitations were thrown around such Courts. It is obvious, from the terms of said Constitution, that no question of legislative interference with a constitutional tenure of office arose in said case. Iowa Const., Art. V., p. 382.

The case of *VanBuren County Supers. v. Mattox*,

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30 Ark., 566, was grounded upon express provisions of the Arkansas Constitution, and is not in point. The Constitution of Arkansas (1868) provides, in Sec. 5, Art. VII., as follows: "The inferior Courts of the State, as now constituted by law, except as hereinafter provided, shall remain with the same jurisdiction as they now possess, provided that the General Assembly may provide for the establishment of such inferior Courts, changes of jurisdiction, or abolition of existing inferior Courts, as may be deemed requisite. The Judges of the inferior Courts herein provided for, or of such as may hereafter be established by law, shall be appointed by the Governor, by and with the advice and consent of the Senate, for the term of six years, and, until such time, the General Assembly shall not interfere with the term of office of any Judge." Hough Amer. Const., Vol. 1, p. 101. In this case an inferior Court was abolished by an Act of the Legislature, and the Judge of the Court instituted a mandamus proceeding to compel the payment of his salary. The Court holding adversely to the contention, said: "Where the Court is abolished, as was the case in this instance, there was no longer an office to fill, no officer, no service to render, and no fees due." It will be seen that said Constitution expressly conferred upon the Legislature the power to abolish inferior Courts. The constitutional limitation upon the Legislature that it should not interfere with the term of office of a Judge is to be construed in connec-

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tion with the provision conferring the power to abolish. This limitation was construed by the Court—that while the office existed only during this time, the term of office should not be interfered with. It is therefore evident that the Court based its conclusion upon the theory that said limitation did not control the provision conferring the express power to abolish, and that the limitation was subordinate to this provision. So, therefore, the case is grounded on an express constitutional provision conferring upon the Legislature the power of abolition, this power of abolition necessarily carrying with it the power of deprivation of office.

The case of *Hoke v. Henderson*, 25 Am. Dec., 677, involved the tenure of office of a clerk—an office recognized by the Constitution of the State, but as to which there was no tenure of office prescribed in that instrument, such tenure being left to the will of the Legislature. 25 Am. Dec., 684. Chief Justice Ruffin, in that case, said: “There is no reason why a public office should not be given during good behavior. The services are what concern the country, and they may be expected to be best done by those whose knowledge of them from time and experience is most extensive and exact. Some offices can, under the Constitution, be granted or conferred for no other term but that of good behavior. Such is the provision respecting the office of a Judge and Justice of the Peace. Certainly that is not introduced solely for the benefit of the

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persons holding those offices, but upon the great public consideration that he who is to decide controversies between the powerful and the poor, and especially between the government and an individual, should be independent, in the tenure of his office, of all control and influence which might impair his impartiality, whether such control be essayed through the frowns of a bad man or through the adulation of an artful one, or such influence be produced by the threats of the government to visit nonconformity to its will by depriving him of office or rendering it no longer a means of livelihood. For these reasons the Constitution has fixed the tenure of the judicial office to be during good behavior. The people have said that the liberty and safety of the citizen required that it should not be held upon any other tenure. □ It is clear, therefore, that our ancestors did not entertain the notion that such a tenure was not consistent with our Constitution generally. It is true that it does not put clerks upon the same basis. There was not the same reason for it. The public interest did not require that any law should be laid down to the Legislature as to the tenure of those offices, but it was left to their discretion as expediency might, from time to time, require it to be altered." 25 Am. Dec., 694, 695.

Notwithstanding these declarations of the Court in that case, it is cited in the brief of the Attorney-general, in this, as sustaining his contention, that the Judges of our inferior Courts are mere legisla-

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tive creatures, to be dealt with as the Legislature pleases. In his brief he sets out a quotation, taken from an isolated portion of the case, which he italicizes. It is as follows: "So also it is yielded, for the like reason, that the office itself, when it ceases to be required for the benefit of the people, may be abolished. There is no obligation on the Legislature or the people to keep up an useless office, or pay an officer who is not needed. He takes the office with the tacit understanding that the existence of the office depends on the public necessity for it, and that the Legislature is to judge of that."

As this quotation omits the language of the Court immediately following the same, we add this language to the quotation, viz.: "But, while these postulates are conceded, the conclusion drawn from them cannot be admitted. They are, that there cannot be private property in the public offices, and if there be that the officer may be discharged at the discretion of the Legislature. Neither of these propositions is believed to be correct." 25 Am. Dec., 693.

The language quoted from that case in the brief of the Attorney-general, was, as will appear from an examination of the case, intended to apply only to offices which were subject to legislative will, and not to offices the tenures of which are constitutionally defined. On the contrary, the case expressly declares that the Legislature is powerless to interfere with offices the tenure of which is constitution-

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ally prescribed. The case is a direct authority against the proposition contended for, and sustains the view herein taken, and so is the case of *State v. Jordan*, 33 S. E. Rep., 139, subsequently decided in the same State.

Having shown that the two Tennessee cases (out of line with former and subsequent cases on the same principle), directly against the holding in *Pope v. Phyfer*, 3 Heis., 682, repudiated by three cases since, precisely in point (*State, ex rel., v. Ridley*, *State, ex rel., v. Leonard*, *State, ex rel., v. Cummins*), never should have been controlling, I wish to present the original question against the merit of these opinions *per se*, and in this connection I would refer, first, to their inherent want of weight, by reason of the fallacious doctrine upon which they are rested. It is, first, the assumption that "whatever the Legislature could establish it could destroy." The authorities already cited and quotations made wholly overturn this assumption. It is clear that when a thing is established by the Legislature, and exists only by virtue of that authority, the authority may be withdrawn and the thing itself destroyed. It is equally clear in reason, and we think we have demonstrated it to be so in authority, that when it is established by virtue of constitutional direction, and to exist and take power and duration, with unchangeable salary, from the Constitution, it is imbedded in the Constitution and beyond legislative control. This principle is enunciated and

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argued, we may say established, in so many of the cases cited that to repeat them here would be not only superfluous but inexcusably tedious.

The second fallacy upon which it was based was the lack of independence of the judicial department. The republican form of government, which we, in common with other States, had adopted, in theory embraced three independent departments, the legislative, executive, and judicial, each supreme in its own sphere and independent of the others. This theory had been assumed to be correct, and this condition of independence actually existing in fact from the adoption of our earliest Constitution, until the case of *Halsey v. Gaines*, in 1879, when it was announced, in words, by this Court that the independence of the judicial department was only "a fiction of law," and that it could not exist without the assent of the Legislature. We quote the language of the opinion on this point: "Much has been said as to the necessity of maintaining the independence of the judiciary, especially to maintain the Courts free from legislative interference. There are provisions of the Constitution intended to promote, in some degree, their independence, and those provisions should be upheld, but independence in fact is 'a fiction of law.' While the Legislature cannot rightfully subvert the judicial department, it possesses many powers against which the Courts have no protection except the integrity of the Legislature itself and of the people. The taxing power belongs

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to the Legislature, and if that body refuses to levy the necessary taxes to support the government, the Courts would be powerless." *Halsey v. Gaines*, 2 Lea, 826.

This fallacious argument, based on supposed revolutionary action of the Legislature, is so fully met and overthrown by Chief Justice Ruffin, in the case of *Hoke v. Henderson*, 25 Am. Dec., 698, that we cannot forbear quoting. He said:

"The argument is, therefore, unsound in this, that it supposes (what cannot be admitted as a supposition) the Legislature will designedly violate the Constitution in utter disregard of their oaths and duty. To do indirectly, in the abused exercise of an acknowledged power, not given for, but perverted to, that purpose, that which is expressly forbidden to be done directly, is a gross and wicked infraction of the Constitution, and the more so because the means resorted to deprive the injured person, and are designed to deprive him, of all redress, by preventing the question becoming the subject of judicial cognizance. But that is not the only test of the constitutionality of an Act of the Legislature. There are many laws palpably unconstitutional which never can be the subjects of legal controversies. Not to allude to the causes which have been recently the themes of the bitterest political controversies, several instances of much simplicity may be adduced from our State government. The Constitution of this State provides that the Governor, At-

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torney-general, Treasurer, and other officers shall be elected by the General Assembly by ballot, and that certain of them shall have adequate salaries during their continuance in office. Suppose the Legislature to refuse to elect these officers or to give them salaries, or, after assigning them salaries in a statute, to refuse to levy taxes or to collect a revenue to pay them. All these would be plain breaches of constitutional duty, and yet a Court could give no remedy, but it must be left to the action of the citizens at large to change unfaithful for more faithful representatives. Yet no one will say that the Legislature can by law remove the Governor, or a Judge, or any other head of a department, because they can unconstitutionally refuse to provide salaries for them and the Courts cannot compel the raising of such salaries. Nor can it be said because there cannot be such compulsion, that, therefore, the law is constitutional. All that can be said is that such is the imperfection of all human institutions, that it is not possible to anticipate and provide against all vices of the heart more than all errors of the head, and that after every precaution much reliance must be placed in the integrity of our fellow-men, and that such confidence is liable to be abused. But I think it may safely be assumed, as is done in the Constitution, with all the responsibilities of the legislative representatives to their constituents under frequent elections, with all the clear declarations of the rights of the citizens

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in that instrument, with the division of the powers of government made in it, whence arise the powers and the duties of the judiciary to ascertain the conformity of a statute with the Constitution, that with all these guards against abuse, the danger of a willful and designed violation is never to be apprehended. No arguments, therefore, in favor of the necessity of executing a particular Act, apparently inconsistent with the Constitution, can be drawn from any supposed ability of the Legislature to effect the same end by indirect means which are beyond the cognizance and control of the judiciary."

The Halsey case had been preceded, in 1875, by that of *State, ex rel. Coleman, v. Campbell* (MS. Jackson, now reported in 3 Shannon, 355), in which it had been held that a Court, Circuit or Chancery, established under the Constitution, might be abolished by the Legislature. The first named case was never published until after the present controversy arose, but the last referred to and was based upon it, going no further in fact, but broadly announcing the principle upon which it was based to be the want of independence of the judicial department under our Constitution. These cases were presented and decided when the question seemed practically to be of minor importance, because they involved but the little interest and the few dollars of the salary of a single Judge, and though apparently earnestly considered and decided after a division and dissenting opinion, we think the scope,

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importance, and vicious extent of the ruling was never properly appreciated by the Court or the bar at that time, and is hardly so now, when we have only the destruction of eleven constitutional judicial offices and officers (counting Judges and District Attorneys), before us, and never will be perhaps until some less envied successors of ours shall have before them the destruction of the entire judicial department. We are sure the extent and consequence of such a construction was never contemplated then. They were faintly perceived in the last case, and an intimation given that legislation to abolish a circuit or division, for the purpose of destroying a Judge, would be unconstitutional, but the Court dealt with this great question like it was to be disposed of on fictions, and, if correct, struck a death blow to the department of the government on whose security and independence the best interests, the lives, liberty, and property of the citizens have always rested in pride, and heretofore in security. The Legislature, however, never deemed it wise until recently to follow this invitation and invade the department which the Constitution made the permanent administrator of justice. In a minor case or two, never of consequence and never noticed until the Leonard case, the Legislature may have asserted the right so conceded, but that department seemed not to desire to adopt the construction given the Constitution. It let Judges go, as they had always gone, uncontrolled by any

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assumption or assertion of general legislative power or control. When the Leonard case arose to again test the power to abolish and establish Courts, it was upon the passage of a County Court bill abolishing the Judge of a single county, about which the majority of the Legislature could care little and know less. It was a local matter, purely, affecting only a single officer in one county. Naturally, it attracted no general notice from the Legislature or from others. It passed under these conditions. When it came before this Court, we then recognized in it a great question, and we treated it as such. We distinctly and in the most unmistakable terms rejected and repudiated the principle and the argument on which the Coleman and the Halsey cases were founded. We dissented most earnestly from the statement formulated in the last case, that judicial independence is a fiction of law, and asserted our rejection of the whole doctrine of those cases in terms so clear that we did not think them susceptible of misapprehension or misconstruction, and we asserted that judicial independence was a constitutional fact, plainly existent in the Constitution, and not to be construed away on any pretext whatever. We asserted that when a Court, under the Constitution, was created, it was to be for the full constitutional term, and could not be abolished. We said this was intended to prevent experimenting with Courts; to cause the Legislature to be careful in creating them, because they could not be destroyed sooner. We

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said it was to give the people opportunity to try them on their merits that the term must be so long. We said it was to make the Judges independent of all apprehension of loss of office by legislative or other interference. We said everything that could be said to mean all this, and thought nobody could mistake it. We said, additionally, that while the Coleman and Halsey cases, with which we did not concur, were not in the way, and could not be overruled because not so, we would overrule them if this case had been like them, and they had therefore required overruling. There can be no doubt of what we then said and meant. We are not the same individuals now, and may not agree, but let us not find differences which do not exist, and which all the world will say do not exist. The same is true of the Cummins case. In principle it is with the Leonard case, and inconsistent with the other two. We can make nothing else out of it, and nothing else can be made out of it. We propose in this dissent to stand by them. They are right, and always were, as the others which they repudiated never were.

Now, as to the object of making three independent departments, and of giving fixed tenures and salaries, it is agreed throughout the United States that this was to secure judicial independence. On this question, and its importance, I cannot forbear some quotations, though, to the legal profession at least, they may be regarded as trite and superfluous.

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The subject is well presented in the able brief of defendant's counsel, in argument and citation, and we can state it no better than by liberal extracts therefrom:

“To secure the independence of the judicial department, the Constitution provides that the term of the service of a Judge should be for eight years, and that his salary should not be diminished during his term of office, this being the only method by which such independence could be preserved to those who exercise the functions of this department. These constitutional provisions guarding the tenure of office and salary of the judiciary, were expressly intended as limitations upon the power of any other department to disturb these safeguards of an independent department. They were intended to be fixed and unalterable, subject alone to one limitation—that is, by the removal of a Judge from office for causes of his own creation, or arising from his personal condition. This limitation is expressed in the provisions for an impeachment or removal from office for cause by a two-thirds vote of both houses. To interfere with the judicial department by any other mode than under the grant of power to remove by impeachment or by a two-thirds vote of both houses, violates the limitations expressed in the provisions securing the judicial tenure of office. There can be no intermediate ground for implication or construction.

“The Legislature can only act under this grant

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of power of removal; any other mode is prohibited. This grant of power of removal by impeachment, or for cause by two-thirds vote, precludes the idea of removal by any other method—abolition or reorganization of Courts or otherwise. If the power of removal by abolition or reorganization of Courts was intended, there was no need of these methods of removal. Removal could be accomplished by the simple and easier method of a majority vote abolishing or reorganizing Courts, and the establishment of new Courts or circuits. The constitutionally defined methods of removal of themselves afford conclusive evidence of the intendment that no other mode could be exercised. 'When the means for the exercise of a granted power are given, no other or different means can be implied as being more effectual or convenient.' The granted power must be exercised in the prescribed manner. Every other mode of executing the power is prohibited. *Norment v. Smith*, 5 Yer., 272; Cooley Const. Lim. (6th Ed.), p. 78.

“‘The affirmation of a distinct policy upon any specific point in a State Constitution implies the negation of any power in the Legislature to establish a different policy. Every positive direction contains an implication against anything contrary to it, or which would prevent or disappoint the purpose of that provision.’ *State v. Halleck*, 33 Am. Rep., p. 551; Cooley on Con. Lim., 6th Ed., 80.

“That the tenure of office provisions of the Constitution were expressly intended to secure the term

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of office and the Judge the office during the tenure, subject alone to the defined grant of power of removal, is firmly established in the light of history and the conditions which led to the establishment of our Federal and State forms of government. When we look to these, we find the full import of the framers of our organic law 'hammered and crystallized' in the few brief words which define and secure judicial independence by a fixed tenure of office, and an undiminished compensation during that tenure.

"The struggle for judicial independence has been a long and eventful one. In England the appointment of Judges was a prerogative of the Crown, and their tenure of office at the pleasure of the Crown. Prior to the reign of James II. this prerogative had been abused by the Stuarts to some extent, but it was abused by James II. so largely and arbitrarily that it became one of the causes of the revolution. Macaulay gives this account of his arbitrary removals of Judges: "Judge after Judge had been stripped of the ermine for declining to give decisions opposed to the whole common law and statute law. Decisions at variance with the spirit of the Constitution had been obtained from these tribunals by turning out Judge after Judge until the bench had been filled with men ready to obey implicitly the directions of the government."

"These many abuses of power are too numerous to detail. They were characterized by judicial mur-

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der, emphasized by tyranny, corruption, and oppression. History was made odious with the bloody assizes of Jeffreys and the execution of Sydney; with the revival of the Star Chamber and the oppression of the High Commission. The efforts of the King to secure from his pliant tools upon the High Commission the conviction of the bishops who dared to disobey his will set England aflame. Then came the revolution, and with it it was made a part of the unwritten Constitution of England that the Judges should hold *quamdiu se bene gesserit*—that is, during life or good behavior, instead of *durante placito*—that is, at the discretion of the Crown, and that they should not be removed from office except upon the address of two-thirds of both houses of Parliament. This establishment of the judicial tenure was first secured, though imperfectly, in the bill of rights following the revolution; then by the statute of 13 William III., defining the judicial tenure in the terms stated, and prohibiting removal from office by the Crown except upon the addresses of two-thirds of both houses of Parliament. But, under the laws, the office of the Judge expired with the demise of the King. Afterward, by statute in the reign of George III., it was provided that the Judges should hold during good behavior, notwithstanding the demise of the King; and also by this statute their full salaries were secured during their continuance in office. In recommending this Act, the King said “he looked upon the independence and uprightness

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of the Judges as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects, and as most conducive to the honor of the Crown." Story on Const., Secs. 1608, 1623, 1624; Hallum's Const. His., 391, 401; 12 Green's Hist. of Eng., Hawthorne Ed. Nations of the World, 80; 2 Macaulay's Hist. of Eng., 62-65, 160, 208, 209, 210, 261, 287, 319, 320, 262 *et seq.*, Vol. 4, p. 147; Impeachment Williams, 336.

" 'In England the complete independence of the judiciary has been considered, and has been found the best and surest safeguard of true liberty, securing a government of known and uniform laws, acting alike upon every man.' Judge Hopkinson, Defense of Chase; note Story Const., Sec. 1619.

" 'Indeed, since the independence of the Judges has been secured by this permanent duration of office, the administration of justice has, with one exception, flowed on in England with an uninterrupted, pure, and unstained current. It is due to the enlightened tribunals of that nation to declare that their bearing, integrity, and impartiality have commanded the reverence and respect of Europe as well as America.' Story on Const., Sec. 1608.

" 'Such was the memorable history of the struggle for the establishment of the independence of Judges in England, and its engraftment into the unwritten Constitution of that country. This independence can now only be terminated by 'an address from both

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houses of Parliament, as the most regular, solemn, and authenticate way by which the dissatisfaction of the people can be expressed.' Dr. Paley (Story on Const., note, Sec. 1609).

“While the Parliament of England is omnipotent, the necessity of judicial independence as a protection of life, liberty, and property, is so firmly imbedded in the English mind that no Parliament has assumed to interfere with the tenure of office of a Judge except upon the gravest of reasons, and only in matters personal to the Judge. The adequate salaries paid the Judges of England, in view of the purposes for which they are paid—to secure the best of judicial service—the salaries can have no place in the consideration of Parliament as a cause to address to the Crown for removal.

“Arbitrary removal by the King of Judges from office in the colonies was one of the causes which led to the declaration of our independence. In that instrument it is recited: ‘He has made Judges dependent on his will alone for the tenure of their offices, and the amount and payment of their salaries.’ In the light of this antecedent history the Constitution of the United States was framed by the Convention of 1787. In addition to its intelligence this body was characterized by thorough knowledge, information, and research, as to political economy, the government of republics, democracies, and the institutions of the mother country. Its purpose was to frame a written instrument to control a great

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people upon the theory of three separate, independent, and co-ordinate departments of government, the executive, judicial, and legislative. Judicial independence was intended to be secured by the provision that 'the Judges of both the Supreme and inferior Courts shall hold their offices during good behavior, and shall at stated times receive for their services a compensation, which shall not be diminished during their continuance in office.' Art III., Sec. 1. This Convention was held with closed doors, and there seems to be no record of its debates, except a few brief minutes of Mr. Yates. After the formation of the Constitution, it was submitted to the respective Conventions of the States for adoption. The records of the debates in some of these Conventions have been preserved, and have been compiled by Mr. Elliott.

"These debates establish beyond controversy that said clause of the Federal Constitution was intended to put the tenure of office of the entire Federal judiciary beyond any legislative interference whatever, except by impeachment. In fact, this was urged upon the State Conventions as one of the main reasons why the Constitution should be adopted. There were objections urged to the provisions as to the judiciary on other grounds, but none upon the matter of independence of the judiciary as secured by a fixed tenure of office. It is clear from these debates that the Constitution was considered as intending that the tenure of office and salaries of

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Judges should not be disturbed during good behavior, and that a breach of the condition of good behavior should only be considered by means of an impeachment. We quote pertinent extracts from the debates in the State Conventions:

“ ‘ MASSACHUSETTS CONVENTION—MR. THACKER.

“ ‘ In this proposed form each branch of power is derived either immediately or directly from the people. The lower houses are elected directly by those persons who are qualified to vote for the Representatives of the State, and at the expiration of two years these become private men, unless their past conduct entitles them to a future election. The Senate is elected by the Legislature of the different States, and represents their sovereignty.

“ ‘ These powers are a check on each other, and can never be made either dependent on one another or independent of the people. The President is chosen by the electors, who are appointed by the people. The High Courts of Justice arise from the President and the Senate, but yet the ministers of them can be removed only upon bad behavior. The independence of Judges is one of the favorable circumstances to public liberty, for when they become the slaves of a venal, corrupt Court, and the hirelings of tyranny, all property is precarious and personal security at an end.’ Elliott’s Debates, Vol. 2, 153, 154.

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“ ‘CONNECTICUT CONVENTION—MR. ELSWORTH, A MEMBER OF THE FEDERAL CONVENTION.

“ ‘This Constitution defines the extent of the powers of the general government. If the General Legislature should at any time overlap its limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void, and the judicial power, the national Judges who, to secure their impartiality, are to be made independent, will declare it to be void. On the other hand, if the States go beyond their limits, if they make the law which is an usurpation upon the general government, the law is void, and upright, independent judges will declare it to be so.’ *Ibid.*, 198, Vol. 2.

“ ‘PENNSYLVANIA CONVENTION—MR. WILSON, A MEMBER OF THE FEDERAL CONVENTION.

“ ‘Sir, it has often been a matter of surprise, and frequently complained of even in Pennsylvania, that the independence of the Judges is not properly secured. The servile dependence of the Judges in some of the States that have neglected to make proper provisions on this subject, endangers the property and liberty of the people, and I apprehend that whenever it has happened the appointment has been for a less period than during good behavior—for if every five or seven years the Judges are obliged to make court for their appointment to office,

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they cannot be styled independent. This is not the case with regard to those appointed under the general government. For the Judges shall hold their offices during their good behavior.' *Ibid.*, Vol. 2, 446.

“‘Now, I proceed to the judicial department, and here, Mr. President, I meet an objection I confess I had not expected, and it seems it did not occur to the honorable gentleman (Mr. Finley) who made it, until a few days ago. He alleges that the Judges, under this Constitution, are not rendered sufficiently independent, because they may hold other offices, and though they may be independent as Judges, yet their other offices may depend upon the Legislature. I confess, sir, this objection appears to me to be a little wire drawn. In the first place the Legislature can appoint to no office, therefore the dependency could not be on them for the office, but rather on the President and the Senate; but, then, these cannot add the salary, because no money can be appropriated but in consequence of a law of the United States. No sinecure can be bestowed on any Judge but by the concurrence of the whole Legislature and the President, and I do not think this an event likely to occur.’ *Ibid.*, Vol. 2, p. 475.

“‘VIRGINIA CONVENTION—EDMOND RANDOLPH, A MEMBER OF THE FEDERAL CONVENTION.

“‘If Congress wish to aggrandize themselves by oppressing the people, the judiciary must first be

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corrupted; no man says anything against them; they are more independent than in England.'

“ ‘ VIRGINIA CONTINUED—PENDLETON.

“ ‘ It will make no difference as to the principles on which the decisions will be made, whether it will come before the State Court or Federal Court. They will be both equally independent, and ready to decide in strict conformity to justice. I believe the Federal Courts will be as independent as the State Courts. I shall no more hesitate to trust my liberty and property to the one than to the other. Whenever, in any country in the world, the Judges are independent, there property is secure. The existence of Great Britain depends on that purity with which justice is administered.

“ ‘ This clause also secures an important point—the independency of Judges both as to tenure of office and fixing salary. I wish the restraint had been applied to increase as well as to diminish.’
Ibid., Vol. 3, pp. 290, 472.

“ ‘ VIRGINIA CONTINUED—JOHN MARSHALL.

“ ‘ Gentlemen have gone on the idea that the Federal Courts will not determine the causes which may come before them with the same fairness and impartiality with which the other Courts decide. What are the reasons of this supposition? Do they draw them from the manner in which the Judges are chosen, or the tenure of their office? What is it

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that makes us trust our Judges? Their independence in office and manner of appointment. Are not the Judges of the Federal Court chosen with as much wisdom as the Judges of the State government? Are they not equally, if not more, independent? Though it may not in general be absolutely necessary, a case may happen, as has been observed, in which a citizen of one State ought to be able to recur to this tribunal to recover a claim from the citizen of another State. What is the evil which this can produce? Will he get more than justice there? The independence of the Judges forbids it. But, says the honorable member, laws may be executed tyrannically. Where is the independence of your Judges? If a law be exercised tyrannically in Virginia, to what can you trust; to your judiciary? What security have you for justice; their independence? Will it not be so in Federal Courts?' Vol. 3, pp. 501, 502, 505, 508.

“ ‘VIRGINIA CONTINUED—MR. MADISON, A MEMBER OF
THE FEDERAL CONVENTION.

“ ‘Having taken this general view of the subject, I will now advert to what has fallen from the honorable gentleman who presides. His criticism is that the judiciary has not been guarded from an increase of the salary of the Judges. I wished myself to insert a restraint on the augmentation, as well as diminution, of their compensation, and supported it in the Convention. But I was overruled. I must

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take the reasons which were urged. They had great weight. The business must increase. If there was no power to increase their pay according to the increase of business, during the life of the Judges, it might happen that there would be such an accumulation of business as would reduce the pay to a most trivial consideration.' *Ibid.*, Vol. 3, p. 489.

“ ‘ VIRGINIA CONTINUED—MR. HENRY.

“ ‘ I consider the Virginia judiciary as one of the best barriers against strides of power; against the power which, we are told by the honorable gentlemen, has threatened the destruction of liberty. Pardon me for expressing my extreme regret that it is in their power to take away that barrier. Gentlemen will not say that any danger can be expected from the State Legislatures. So small are the barriers against the encroachments and usurpations of Congress, that when I see this latter barrier, the independency of the Judges, impaired, I am persuaded I see the prostration of all our rights. In what situation will your Judges be when they are sworn to preserve the Constitution of the State and of the general government? If there be a concurrent dispute between them, which will prevail? They cannot serve two masters struggling for the same object. The laws of Congress being paramount to those of the States, and to their Constitutions also, whenever they come in competition, the Judges must decide in favor of the former. This, instead

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of relieving or aiding me, deprives me of my only comfort, the independency of the Judges. The judiciary are the sole protection against a tyrannical execution of the laws. But if by this system we lose our judiciary, and they cannot help us, we must sit down quietly and be oppressed.' *Ibid.*, Vol. 3, p. 591.

“ ‘ VIRGINIA CONTINUED—MR. GRAYSON.

“ ‘ Something has been said of the independency of the Federal Judges. I will only observe that it is on as corrupt a basis as the art of man can place it. The salaries of the Judges may be augmented. Augmentation of salary is the only method that can be taken to corrupt a Judge.' *Ibid.*, Vol. 3, pp. 511, 512.

“ ‘ VIRGINIA CONTINUED—MR. GEORGE NICHOLAS.

“ ‘ It has been observed, sir, that the Judges appointed under the British Constitution are more independent than those to be appointed under the plan on the table. This, sir, like other assertions of honorable gentlemen, is equally groundless. May there not be a variety of pensions granted to the Judges in England so as to influence them, and cannot they be removed by a vote of both houses of Parliament? This is not the case with our Federal Judges—they are to be appointed during good behavior, and cannot be removed, and at stated

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times are to receive a compensation for their services.' *Ibid.*, Vol. 3, p. 526.

“ ‘NORTH CAROLINA CONVENTION—MR. STEELE.

“ ‘Will the members of Congress deviate from their duty without any prospect of advantage to themselves? What interest can they have to make the place of elections inconvenient? The judicial power of the government is so well constructed as to be a check. There was no check in the old confederation. Their power was, in principle and theory, transcendent. If the Congress make laws inconsistent with the Constitution, independent Judges will not uphold them, nor will the people obey them.’ *Ibid.*, Vol. 4, pp. 93–94.

“ ‘The intention of permanency in the judicial tenure of office is also conclusively shown by articles of Alexander Hamilton in advocacy of the adoption of the Federal Constitution by States. These articles of Mr. Hamilton (a member of the Convention) published in the *Federalist*, set out the intention of the Convention in adopting the judicial tenure of office clause, and in them he shows conclusively that this clause was framed expressly to secure the Federal judiciary from any interference, direct or indirect (except by impeachment), on the part of any co-ordinate department of the government. These articles (approved by Story) are too lengthy to quote in full, and we therefore refer the Court to them for the full context, all bearing with great force

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upon the question of judicial independence. Mr. Hamilton says:

“ ‘According to the plan of the Convention, all the Judges who may be appointed by the United States are to hold their offices during good behavior, which is conformable to the most approved of the State Constitutions, among the rest, that of this State. The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.

“ ‘Whoever attentively considers the different departments of power, must perceive that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution, because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community; the Legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated; the judiciary, on the contrary, has no influ-

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ence over either the sword or purse; no direction either of the strength or the wealth of society, and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment, and must ultimately depend upon the aid of the executive for the efficacious exercise even of this faculty. This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is, beyond comparison, the weakest of the three departments of power; that it can never attack with success either of the other two, and that all possible care is requisite to enable it to defend itself against their attacks.

“It proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that as all the effects of such an union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as from the natural feebleness of the judiciary it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may, therefore, be justly regarded as an indispensable ingredient in its constitution; and, in a great measure, as the citadel of the public justice and of the public security, the complete independence of the Courts of justice is peculiarly essential in a limited Constitution.

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“ ‘If, then, the Courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the Judges which must be essential to the faithful performance of so arduous a duty.

“ ‘This independence of the Judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and a more deliberate reflection, have a tendency in the meantime to occasion dangerous innovations in the government and serious oppressions of the minor party in the community, for it is easy to see that it would require an uncommon portion of fortitude in the Judges to do their duty as faithful guardians of the Constitution where legislative invasions of it had been instigated by the major voice of the community.

“ ‘That inflexible and uniform adherence to the rights of the Constitutions and of individuals, which we perceive to be indispensable in the Courts of justice, can certainly not be expected from Judges who hold their offices by temporary commission.

“ ‘There is yet a further and weighty reason for the permanency of judicial offices, which is deducible

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from the nature of the qualifications they require. It has been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid arbitrary discretion in the Courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them, and it will readily be conceived, from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of these precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the station of Judges; and making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. These conditions apprise us that the government can have no great option between fit characters, and that a temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able and less well qualified to conduct it with ability and dignity.

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“ ‘Upon the whole, there can be no room to doubt that the Convention acted wisely in copying from the models of those Constitutions which have established good behavior as the tenure of judicial offices in point of duration, and that so far from being blamable on this account, their plan would have been inexcusably defective if it had wanted this important feature of good government. The experience of Great Britain is an illustrious comment on the excellence of the institution.’ ” Federalist, Nos. 78 and 79, p. 362 to 371.

“ Another evidence of this purpose of the Federal Constitution is to be found in the rejection, by the Convention framing the same, of two propositions. One of these propositions was to make the Judges removable by the President upon the application of the Senate and House of Representatives; the other to authorize the removal of Judges on account of their disability to discharge the duties of their offices. That these propositions were rejected for the reason that they might effect judicial independence is shown by Mr. Story in his work on Constitutions. Story on Con., Secs. 1622, 1623, 1624, 1625, 1626.

“ The judicial tenure of office clause in the Constitution of 1796 is to be interpreted in connection with antecedent history. It was in the light and knowledge of the fierce struggle which took place in England to secure judicial independence; of the solemn protest of the Declaration of Independence against the interference of the King with the tenure

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of officials, the colonial Judges and their salaries; and of the history of the formation and adoption of the Federal Constitution and the engraftment into the same of a fixed tenure of office paramount (except by impeachment) to any legislative will, that the first Constitution of the State was framed in 1796. This Constitution provided that Judges should 'hold their offices during their good behavior.' The meaning of these words is to be interpreted in the light of the history and conditions preceding the formation of the Constitution. So interpreted, it seems beyond controversy that this provision was intended to secure to the Judges a tenure of office safe from any legislative interference or abridgment, direct or indirect, except for causes for which the Judge might become responsible by breaching the condition of good behavior, this being provided for by impeachment. Cooley on Cons. Lim., 6th Ed., p. 80.

"It is evident that the judicial tenure of office provided for in the Constitution of 1796 was modeled after the Federal Constitution, and was intended to bear the same meaning and construction.

"Under these conditions, and with these preceding events in the knowledge of the Convention, it seems wholly unreasonable to suppose this tenure of office clause was intended to be in any way abridged or limited by the clause in said Constitution providing that the judicial power of the State 'shall be vested in such superior and inferior courts of law and

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equity as the Legislature shall from time to time direct and establish.' If the tenure of office clause in said Constitution of 1796 was intended to be paramount to said last clause, the tenure of office clause in the Constitution of 1870 must also be construed as paramount to the clause providing that the Legislature shall 'ordain and establish inferior courts.'

"The Convention of 1796 framed an organic law (said by Jefferson to be 'the least imperfect and most republican' of any then framed) to govern a free people. Its every intent and purpose must have been to erect every barrier to oppression and to provide every possible safeguard for the protection of the people. With the dangers which attended a judiciary dependent upon the King, and the protest of the Declaration of Independence in its knowledge, it seems incredible that this Convention intended to submit judicial independence to abridgment and destruction by legislative will, thus transferring dominion from an executive power to a legislative power—a change from one to many masters. The authority of said Convention given to the Legislature to 'ordain and establish courts,' viewed in the light of history, could not have been intended to permit the destruction of the judicial tenure expressed in terms, and thus by a mere implication permit the power to interfere with judicial independence by the abolition of courts.

"Story, Tucker, and Kent fully sustain the con-

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tentions we make. These masters of constitutional law forcefully, clearly, and exhaustively give conclusive reasons why the judicial tenure of office expressed in the terms 'during good behavior,' expressly protect against all legislative interference except by impeachment. They are too lengthy to quote in full; only extracts can be given, and the Court cited to the full version. 1 Kent's Com., 13 Ed., 293 to 295; Story Const., Secs. 1607 to 1613.

"Mr. Kent, after referring to the importance of judicial independence, so that the Judges might stand against all improper influences, says:

"'To give them the courage and the firmness to do it, the Judges ought to be confident of the security of their salaries and station. The provision for the permanent support of the Judges is well calculated, in addition to the tenure of their office, to give them the requisite independence. It tends also to secure a succession of learned men on the bench, who in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuits of private business for the duties of that important station.'" 1 Kent, 294-5.

"Mr. Story:

"'The reasons in favor of the independence of the judiciary apply with augmented force to republics, and especially to such as possess a written Constitution with defined powers and limited rights. It is obvious that, under such circumstances, if the tenure of office of the Judges is not permanent,

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they will soon be rendered odious, not because they do wrong, but because they refuse to do wrong; and they will be made to give way to others who shall become more pliant tools of the leading demagogues of the day. There can be no security for the minority in a free government, except through the judicial department.

“In the next place, the independence of the judiciary is indispensable to secure the people against the intentional as well as unintentional usurpation of the executive and legislative departments. It has been observed with great sagacity that power is perpetually stealing from the many to the few; and the tendency of the legislative department to absorb all the other powers of the government has always been dwelt upon by statesmen and patriots as a general truth, confirmed by all human experience.

“Thus, in the free government of Great Britain, an Act of Parliament, combining as it does the will of the Crown and of the Legislature, is absolute and omnipotent. It cannot be lawfully resisted or disobeyed. The judiciary is bound to carry it into effect at every hazard, even though it should subvert private rights and public liberty. But it is far otherwise in a republic like our own, with a limited Constitution, prescribing at once the powers of the rulers and the rights of the citizens. This very circumstance would seem conclusively to show that the independence of the judiciary is absolutely

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indispensable to preserve the balance of such a Constitution. In no other way can there be any practical restraint upon the acts of the government, or any practical enforcement of the rights of the citizens.

“Does it not follow that to enable the judiciary to fulfill its functions it is indispensable that the Judges should not hold their offices at the mere pleasure of those whose acts they are to check, and if need be to declare void? Can it be supposed for a moment that men holding their offices for the short period of two or four or even six years, will be generally found firm enough to resist the will of those who appoint them and may remove them?

“The truth is, that even with the most secure tenure of office during good behavior, the danger is not that the Judges will be too firm in resisting public opinion and in defense of private rights or public liberties, but that they will be too ready to yield themselves to the passions and politics and prejudices of the day. In a monarchy the Judges in the performance of their duties with uprightness and impartiality, will always have the support of some of the departments of the government, or at least of the people. In republics they may sometimes find the other departments combined in hostility against the judicial; and even the people for a while, under the influence of party spirit and turbulent factions, ready to abandon them to their fate. Few men

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possess the firmness to resist the torrent of popular opinion, or the content to sacrifice present ease and public favor in order to earn the slow rewards of a conscientious discharge of duty, the sure but distant gratitude of the people, and the severe but enlightened award of posterity.

“ ‘The considerations above stated lead to the conclusion that in republics there are in reality stronger reasons for an independent tenure of office by the Judges, a tenure during good behavior, than in a monarchy. Indeed, a republic with a limited Constitution, and yet without a judiciary sufficiently independent to check usurpation, to protect public liberty, and to enforce private rights, would be as visionary and absurd as a society organized without any restraints of law.

“ ‘In human governments there are but two controlling powers—the power of arms and the power of laws. If the latter are not enforced by a judiciary above all fear and above all reproach, the former must prevail, and thus lead to the triumph of military over civil institutions. The framers of the Constitution, with profound wisdom, laid the cornerstone of our national republic in the permanent independence of the judicial establishment. Upon this point their vote was unanimous.

“ ‘The main security relied on to check an irregular or unconstitutional measure, either of the executive or the legislative department, was, as we have seen, the judiciary. To have made the Judges,

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therefore, removable at the pleasure of the President and Congress, would have been a virtual surrender to them of the custody and appointment of the guardians of the Constitution. It would have been placing the keys of the citadel in the possession of those against whose assaults the people were most strenuously endeavoring to guard themselves. It would be holding out a temptation to the President and Congress, whenever they were resisted in any of their measures, to secure a perfect irresponsibility by removing those Judges from office who should dare to oppose their will. Such a power would have been a signal proof of a solicitude to erect defenses round the Constitution for the sole purpose of surrendering them into the possession of those whose acts they were intended to guard against. Under such circumstances, it might well have been asked . where could resort be had to redress grievances or so overthrow usurpations?

“ ‘The next clause of the Constitution declares that the Judges of the Supreme and inferior Courts shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office. Without this provision the other, as to the tenure of office, would have been utterly nugatory, and, indeed, a mere mockery.

“ ‘It is almost unnecessary to add that although the Constitution has, with so sedulous a care, endeavored to guard the judicial department from the overwhelming influence or power of the other co-

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ordinate departments of the government, it has not conferred upon them any inviolability or irresponsibility for an abuse of their authority. On the contrary, for any corrupt violation or omission of the high trusts confided to the Judges, they are liable to be impeached (as we have already seen), and, upon conviction, removed from office. Thus, on the one hand, a pure and independent administration of public justice is amply provided for, and, on the other hand, an urgent responsibility secured for fidelity to the people.' Story Const., Secs. 1610, 1612, 1613, 1614, 1619, 1621, 1624, 1628, 1635.

“He further says, quoting from Mr. Justice Wilson: ‘In the United States this independence extends to Judges in Courts inferior as well as supreme. This independency reaches equally their salaries and their commissions. In England the Judges of the superior Courts do not now, as they did formerly, hold their commissions and their salaries at the pleasure of the Crown, but they still hold them at the pleasure of the Parliament; the judicial subsists, and may be blown to annihilation, by the breath of the legislative department. In the United States the Judges stand upon the sure basis of the Constitution, the judicial department is independent of the department of the Legislature. No Act of Congress can shake their commission or reduce their salaries. The Judges, both of the supreme and inferior Courts, shall hold their offices during good behavior, and shall, at

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stated times, receive for their services a compensation which shall not be diminished during their continuance in office.' Story Const., Sec. 1632.

“See also the remarks of Judge Hopkinson upon the independence of the judiciary, made in defense of Mr. Chase upon his impeachment (Story Const., Sec. 1619, note 3), and see Mr. Tucker's views, expressed in his Commentaries on Blackstone, in which he says, among other cogent expressions: ‘This absolute independence of the judiciary, both of the executive and the legislative departments, which I contend is to be found both in the letter and spirit of our Constitutions, is not less necessary to the liberty and security of the citizen and his property in a republican government than in a monarchy. Such an independence can never be perfectly attained but by a constitutional tenure of office, equally independent of the frowns and smiles of the other branches of the government. And herein consists one of the greatest excellencies of our Constitution, that no individual can be oppressed whilst this branch of the government remains independent and uncorrupt, it being a necessary check upon the encroachments or usurpation of power by either of the other. And as from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches, who have the custody of the purse and the sword of the confederacy, and as nothing can contribute so much to its firmness or independence

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as permanency in office; this quality, therefore, may be justly regarded as an indispensable ingredient in the Constitution, and in a great measure as the citadel of the republic, justice, and the public security.' 1 Tuck. Black. Com. App., 354-356 to 360.

“ ‘Whatever, then, has been said by Baron Montesquieu, De Lolme, Judge Blackstone, or any other writer, on the security derived to the subject from the independence of the judiciary of Great Britain, will apply at least as forcibly to that of the United States. We may go still further. In England the judiciary may be overwhelmed by a combination between the executive and the legislative. In America (according to the true theory of our Constitution) it is rendered absolutely independent of, and superior to the attempts of both to control or crush it: first, by the tenure of office, which is during good behavior; these words (by a long train of decisions in England, even as far back as Edward III.) in all commissions and grants, public or private, importing an office or estate for the life of the grantee, determinable only by his death or breach of good behavior. Secondly, by the independence of the Judges in respect to their salaries, which cannot be diminished.’ Story on Cons., Sec. 1620, note 2; Sec. 1627, note 1.

But it is said by the majority that if the Coleman and Halsey cases in Tennessee, the cases referred to, be not overruled in terms, they are *stare decisis*, and should be adhered to. The answer to that, in the first place, is that they have

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not been adhered to. The Leonard case and the Cummins case directly overturn them—that is, they repudiate them in principle. It is not necessary that they be declared overruled. It is sufficient if later cases be inconsistent with them in principle. In some Courts this is the only practice of overruling. It is so in the Supreme Court of the United States. That Court never says it overrules a case. It merely proceeds on an antagonistic principle to decide some other. But the cases never were *stare decisis*. “Erroneous decisions under the Constitution as to the tenure of a Judge’s office will be overruled as not within the doctrine of *stare decisis*, which does not apply to questions of constitutional law.” 12 Am. & Eng. Enc. L., 18. I quote literally; the cases are cited in the notes. But it is said some other statutes like this in exceptional cases may have been passed. To this I wish to answer in the language of a great Judge of this State deciding a similar case. He said:

“It is said by counsel that the Legislature has passed many statutes similar to this, and various cases are referred to. I acknowledge the force of the authority of adjudication upon analogous cases. It sometimes presents a forcible and conclusive argument. But it is a sufficient answer to the argument upon this point to say that the cases and decisions referred to, though analogous, were not made in this precise case, and I can never follow precedent in the line of analogy when it leads to an infraction of the

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Constitution. Hence the necessity of a frequent recurrence to first principles. If we follow precedent and move on according to the analogy of cases, we shall be led from step to step until the Constitution itself will be lost amid the subtleties of the law. When precedent is established in the construction of statute or common law, I concede the propriety of following it, unless flatly absurd or unjust. But every Judge, and other public officer, when called on to do an official act, must judge of the Constitution for himself, for no precedent however grave and no adjudication however respectable can warrant a violation of that sacred instrument." *Bank v. Cooper*, 2 Yer., 622.

This was the language of a Judge who, in uttering it, denied his right to sit upon another Court and take another salary.

The truth is, the judiciary is marked for sacrifice. The Constitution established three, and only three, great departments—the legislative, the executive, and the judicial. The other two have remained intact. Other departments, boards, bureaus, and commissions, with consequent great expense, have been grafted on the government. Schools, asylums, and State institutions generally, have called for more and more. Tax-bearing has become a grievous burden, and the people are to be taught that the judicial department is its cause. The attention of the country is turned to the Courts, and the abolition of one of the constitutional departments demanded. Three departments

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are too many for the Constitution. Five or six may not be for government, but three are too many there. One must, therefore, be destroyed. The judicial is singled out for destruction. If this Act is valid it is gone, and with what resultant benefits to the people? The saving of one and a half cents each to our population, or of five cents annually to each voter of the State, and not the hundredth part of a cent on the taxable valuation of its property. This, it would seem, is a poor return for the destruction of constitutional Courts, and constitutional Judges and District Attorneys, and confusion of public business and the general impediment of public justice, and the deprivation of eleven citizens of constitutional rights they had spent their lives in acquiring fitness to exercise and years of struggle in acquiring the positions from which they are ejected. No other constitutional department has ever been assailed or impaired. The executive has been fostered and protected. The legislative has been honored and preserved. No legislative representative has ever been denied his legal tenure of office, and in all the legislative redistricting the membership has been increased, but never has one been denied the right to his office during his constitutional tenure. We solemnly protest against this invasion of the judicial department as the establishment of a ruinous precedent, and that this Court should be constrained to lend its sanction to that destruction and see prostrate before it the wreck of its department.

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It is finally said, however, we have a legislative precedent in the Federal Government of long standing, and it should be looked to. In 1801 the Federal Congress created sixteen circuit judgeships. The Act passed to enable him to do so, and Mr. Adams made the appointments of the Judges on the last day of his term. When Mr. Jefferson came in, with the Congress of 1802, attention was called to this Act in his message, and ready partisans offered bills to repeal it. It was repealed during the session of 1802 by a partisan vote, after one of the greatest debates ever made in Congress, in which the notable device of "taking the office from the Judge," when the Constitution did not permit you to "take the Judge from the office" was invented. It worked, and served its purpose, and the Courts were never invoked to test its constitutionality. It made a bad precedent, which no Congress has followed, and the invalidity of it, in consequence of the indisposition of the Judges at that early day to enter into a struggle with the other departments of the government, and who retired without contest, was, therefore, never embalmed in judicial records. But it was in judicial disesteem and disapprobation. It was condemned by all the great Judges and law authors. I append a few of them, worthy to be perpetuated, and which should always be recalled whenever and wherever a controversy on the same question arises.

Mr. Story, speaking of it, says: "But, unfortu-

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nately, a measure was adopted, in 1802, under the auspices of President Jefferson, which, if its constitutionality can be successfully vindicated, prostrates in the dust the independence of all inferior Judges, both as to the tenure of their office and their compensation for services, and leaves the Constitution a miserable and vain delusion. In the year 1801 Congress passed an Act reorganizing the judiciary and authorizing the appointment of sixteen new Judges, with suitable salaries, to hold the Circuit Courts of the United States in the different circuits created by this Act. Under this Act the Circuit Judges received their appointments and performed the duties of their offices until the year 1802, when the Courts established by the Act were abolished by general repeal of it by Congress, without in the slightest manner providing for the payment of the salaries of the Judges, or for any continuation of their offices. The result of this Act, therefore, is (so far as it is a precedent) that notwithstanding the judicial tenure of office of the Judges of the inferior Courts is during good behavior, Congress may at any time, by a mere act of legislation, deprive them of their offices at pleasure, and with it take away their whole title to their salaries. How this can be reconciled with the terms or the intent of the Constitution is more than any ingenuity of argument has ever, as yet, been able to demonstrate. The system fell, because it was unpopular with those who were then in possession of power, and the vic-

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tims have hitherto remained without indemnity from the justice of the government.

“Upon this subject a learned commentator has spoken with a manliness and freedom worthy of himself and of his country. To those who are alive to the just interpretation of the Constitution; those who, on the one side, are anxious to guard against the usurpation of power injurious to the State, and those who, on the other side, are equally anxious to prevent a prostration of any of its great departments to the authority of the others, the language can never be unseasonable, either for admonition or instruction, to warn us of the facility with which public opinion may be persuaded to yield up some of the barriers of the Constitution under temporary influences, and to teach the duty of an unsleeping vigilance to protect that branch which, though weak in its powers, is yet the guardian of the rights and liberties of the people. It was supposed,” says the learned author, “that there could not be a doubt that those tribunals in which justice is to be dispensed according to the Constitution and laws of the confederacy; in which life, liberty, and property are to be decided upon; in which questions might arise as to the constitutional powers of the executive, or the constitutional obligation of an Act of the Legislature, and in the decision of which the Judges might find themselves constrained, by duty and by their oaths, to pronounce against the authority of either, should be stable and permanent, and

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not dependent upon the will of the executive or Legislature, or both, for their existence; that, without this degree of permanence, the tenure of office during good behavior could not secure to that department the necessary firmness to meet unshaken every question, and to decide as justice and the Constitution should dictate, without regard to consequences. These considerations induced an opinion, which, it is presumed, was general, if not universal, that the power vested in Congress to erect from time to time tribunals inferior to the Supreme Court, did not authorize them at pleasure to demolish them. Being built upon the rock of the Constitution, their foundation was supposed to partake of its permanency, and to be equally incapable of being shaken by the other branches of the government. But a different construction of the Constitution has lately prevailed. It has been determined that a power to ordain and establish, from time to time, carries with a discretionary power to discontinue and demolish; that although the tenure of office be during good behavior, this does not prevent the separation of the office from the officer by putting down the office, but only secures the officer his station upon the terms of good behavior, so long as the office itself remains. Painful, indeed, is the remark that this interpretation seems calculated to subvert one of the fundamental pillars of free government, and to have laid the foundation of one of the most dangerous political schisms that has ever

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happened in the United States of America." Story's Const., Secs. 1633-4.

The commentator here referred to was Mr. Tucker, who, in his commentaries, says: "The Act gave rise to one of the most animated debates to be found in the annals of Congress, and was resisted by a power of argument and eloquence which has never been surpassed. These debates were collected and printed in a volume at Albany, in 1802, and are worthy of the most deliberate perusal of every constitutional lawyer. The Act may be asserted, without fear of contradiction, to have been against the opinion of a great majority of all the ablest lawyers at the time, and probably now, when the passions of the day have subsided, few lawyers will be found to maintain the constitutionality of the Act. No one can doubt the perfect authority of Congress to remodel their Courts, or to confer or withdraw their jurisdiction at their pleasure. But the question is whether they can deprive them of the tenure of their office and their salaries after they once become constitutionally vested in them." See Tuck. Black Comm., 22-25.

The judiciary is the weakest of all the departments of the government. "The legislative is the greatest and the overruling power in all free governments. It has been generally recognized by the students of our constitutional law that the danger to judicial independence lies in the legislative department. The safeguards against legislative power are

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only two—tenure of office and a fixed compensation while in office. Destroy these, especially the first, and the inevitable result is judicial dependence, with its evils.” Story Const., Secs. 531–542.

This danger must have been known and recognized by the authors of our Constitutions. Therefore every constitutional limitation upon legislative power must be given the fullest force and expression, and must have been so intended. It is argued that, prior to the Constitution of 1870, our Court, though not deciding the question, has used expressions which acquiesce in the power of the Legislature to deprive a Judge of his office by the abolition of his Court. This proposition cannot be maintained. No case can be found prior to the Constitution of 1870 which invoked any judicial declaration, either directly or indirectly, as to the legislative power to abridge or terminate a judicial tenure of office. The cases in which expressions have been used as to the power of the Legislature to abolish Courts in no-wise involved the tenure of office of a Judge. The Legislature has the power to add to or withdraw a part of the territory or jurisdiction of an inferior Court, provided the office of the Judge is left intact. It may also abolish an inferior Court, to take effect at the end of the judicial term of office. The expressions used in the case relied on to show such acquiescence are referable to the legislative power of reorganization or abolition, when such action may be legitimately exercised without

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interference with any constitutional limitation, but the legislative power to abolish a Court so as to destroy the tenure of office of the Judge is a different question. We refer to the cases above, upon which said claim is based. They are three in number, viz.: In the case of the *Bank v. Cooper* (1831) the Court used the expression that the Legislature may abolish a Court. In that case no question of the judicial tenure of office was in issue, nor anything to direct the attention of the Court to the same, the question involved being the constitutionality of an Act constituting existing Judges a special tribunal for the disposition of suits commenced by the Bank of Tennessee. 2 Yer., 600, 601. But in this very case there are words used by the Court which of themselves carry the implication that the legislative department could not interfere with the judicial department, so as to affect the independency of this department. The Court says: "The framers of the Constitution never dreamed of admitting the arbitrary exercise of power of any department of the government. The legislative, executive, and judicial departments are three lines of equal length, balanced against each other, and the framework becomes stronger the more its parts are pressed." If the tenure of office is destroyed, that destroys the triangle.

In the case of *Miller v. Conlee* (1858), 5 Sneed, the Court held as unconstitutional an Act transferring cases from the Chancery Court to the Supreme

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Court, when they had been twice continued on account of the incompetency of the Chancellor. The Court, in holding that the Supreme Court was an appellate Court established by the Constitution, uses these words: "The people have trusted to this department supreme judicial power, and placed it and its jurisdiction beyond the legislative power. Neither one can interfere with or control the other in the proper discharge of its functions. Under the old Constitution this was not so. This department was by that entirely the creature of the Legislature." The Legislature may destroy its judicial creation by the exercise of power not limited by the Constitution, and in this sense inferior Courts are its creatures, but this does not mean that in the exercise of legislative power a constitutional office may be destroyed and its incumbent removed from office. 5 Sneed, 432.

In *Moore v. State* (1857), the question was whether the Legislature had the power to create the office of County Judge for particular counties without the law applying to all the counties in the State. In deciding this case the Court used this language: "It was with the Legislature to determine how many and what kinds of Courts are required for the administration of justice, and what shall be the character and limits of the jurisdiction of each." The expression "to determine how many Courts are required in the administration of justice, and what shall be the character and jurisdiction of each," is not

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to be construed as meaning that the Legislature had the power to lessen the number of Courts by abolishing the same, when to do so would operate to abridge the tenure of office. None of said cases bear the construction that the Legislature may exercise the power of abolition or reorganization of Courts where the tenure of office of the incumbent would thereby be affected. 5 Sneed, 510, 511.

But there are cases in Tennessee, decided prior to the Constitution of 1870, which substantially declare that the Legislature has no power to abridge the term of office of a Judge or a constitutional officer, and as we have seen, there are four decided since, declaring that the Legislature has no power to destroy a constitutional Court (*Pope v. Phifer*, 3 Heis., 683), or a constitutional Judge (*State v. Ridley*, *State v. Leonard*, 2 Pickle, 485), or a constitutional officer (*State v. Cummins*, 10 Pickle, 667).

The Constitution of 1834 provided Justices of the Peace should be elected for the term of six years. Davis in 1852 was elected a Justice of the Peace, to fill a vacancy occasioned by resignation from office of an incumbent whose term would have expired on February 2, 1854. On that day Davis ran for Justice of the Peace and was defeated. In 1833 an Act had been passed providing in case of vacancies an election should be held to "fill out the time for which his predecessor was elected, and no longer." Davis, though defeated in said election, claimed the office; that said Act was void under said

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Constitution providing his term of office as a Justice of the Peace should be for six years, and that the Legislature had no power to shorten the term by said Act. The Court so held, saying, with reference to the Constitution: "The term is there fixed at six years, under all circumstances and without exception, and no power is given to the Legislature to abbreviate it, but only to provide for the mode and manner of keeping the office filled. This is the extent of the power delegated, and it does not reach the term of service; that is unalterably fixed at six years by the highest law, and it is not competent for the Legislature to shorten any more than it is to lengthen it." This case was decided in 1855. *Keys v. Mason*, 3 Sneed, 8, 10.

If a constitutional term of office cannot be shortened by the Legislature in advance of the term, can it shorten it after the term begins? "It is not competent for the Legislature to shorten the term of an office prescribed by the Constitution, and any enactment to that effect is void." *Rambo v. Maloney*, 8 Pickle, 68; *Brewer v. Davis*, 9 Hum., 213; *Powers v. Hurst*, 2 Hum., 24.

In 1827 an Act was passed providing that the Governor should appoint a special Judge to hold Courts in case the regular Judge should, on account of disability, be unable to hold his Courts. The Supreme Court (1833) held this Act unconstitutional, on the ground that the Constitution of 1796 having provided the tenure of office of Judges should be

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“during good behavior,” said Act was in violation of this constitutional provision, and that the Legislature was by the same prohibited from interfering with this tenure. The Court says: “Why was it provided by the Constitution that the Judges appointed should hold their respective offices during their good behavior? Our Declaration of Independence tells us, when enumerating the usurpations of the British King authorizing the separation, ‘he has made Judges dependent on his will alone for the tenure of their offices, and the amount of their salaries.’ Of course dependent upon his pleasure, and subject to be used as instruments so long as they were obedient, and, when they were otherwise, subject to be turned off and more pliant ones put in place. Were this commission sanctioned, we might presently fall on the old evil. The Legislature has just as little right to change the appointing power of one of its own members.” Here we have an express judicial declaration that the constitutional tenure of office shall not be interfered with, even though the public interest required it. *Smith v. Normont*, 5 Yer., 273, 274.

These two cases expressly decide the tenure and term of office fixed by the Constitution to be unalterable constitutional limitations, which prohibit any legislative violation of the limitations. The case of *Pope v. Phyfer*, 3 Heis., 682, expressly decided that the Legislature could not abolish a constitutional Court. The office of Judge of an inferior Court, the Judges

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selected to exercise and enforce the judicial power invested in the Court, and the term of office, are all constitutional creations which form a constitutional part of the Court, and are not subject to legislative control other than by a constitutional grant of power authorizing legislative control. In the absence of any constitutional limitation, the Legislature would have the power to create Courts, to abolish such Courts, abridge terms of office, and deprive Judges of their offices. Therefore, whenever such legislative power is made the subject of constitutional provisions, such provisions are necessarily to be construed as intended to be a limitation upon or regulation of the legislative power. In such cases, to qualify or abridge such limitation requires a constitutional grant of power.

The Legislature, under the Constitution, has the power to ordain and establish inferior Courts—that is, to designate the same, and define their jurisdiction, and regulate the salary of the incumbent previous to his incumbency. But when this power is exercised—the power to either create the office of Judge, or fix the term of office, or to designate the mode of selection of the incumbent, or to regulate his salary during his incumbency, or to invest him with judicial power—all these are constitutional creations, and derive their existence solely from the Constitution.

These constitutional creations are guarded by express provisions of the Constitution limiting legislative power, viz.: (1) Term of office shall be eight years. (2) The Judge shall hold the office for

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eight years. Shall hold his office until his successor is elected or appointed and qualified. (3) His salary shall not be diminished during his continuance in office. Const., Art. VI., Sec. 4-7; Art. VII., Sec. 5.

These limitations on legislative power were made a part of the Constitution to secure judicial independency. "When once we know the reason which determined the will of the lawmakers, we ought to interpret and apply the words used in a manner suitable and consistent to that reason, and as will be best calculated to effectuate the intent." Cooley Const. Lim. (6th Ed.), p. 80.

The intention of these provisions is not disputed, but they are sought to be evaded on the theory that they were not intended to cover cases of the abridgment of the term of office, or destroying the office, or depriving the Judge of his office and diminishing his salary, where the same is effected by abolishing a Court. The proposition is, that while a Judge cannot, by an Act, be constitutionally removed from office, the office may be, by an Act, constitutionally removed from a Judge, and that, by removing the office from the Judge, no constitutional limitation is violated. If this be true, these constitutional creations, which form a constituent part of the Court, are made subservient to legislative control, implied from the power to designate and establish Courts, the judicial powers of which, with the office of Judge, his term of office, and his compensation, are derived from the Constitution.

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“An Act repealing *in toto* a statutory provision for the salary of an Assistant Clerk of a separate orphan’s Court, appointed by the Clerk of such Court pursuant to authority conferred upon him by the State Constitution, without making other provisions for such salary, is unconstitutional, its effect being to abolish the office of Assistant Clerk.” The Legislature cannot, except by constitutional authority, remove a constitutional officer, “because the power to remove is limited to the power to create.” The proposition contended for, if sustained, not only deprives a constitutional officer of his salary, but also of his office. *Reed v. Smoulter* (Pa.), 5 La. Ann., 517, 518; *Attorney-general, ex rel. Jochim*, 25 L. R. A., 703.

The constitutional clause providing that inferior Courts should be “ordained and established” by the Legislature, was intended to meet conditions which might arise and require the establishment of tribunals necessary to the administration of justice. It was impracticable, in framing a Constitution, to create such Courts and define their jurisdiction. These were the reasons for leaving this matter to the Legislature. But in doing so it was not intended to make Courts created by the Legislature, under said provisions, sole creatures of the Legislature, which it might at its pleasure, and without regard to constitutional limitations, destroy, under the theory that the power to create conferred the power to destroy.

The Legislature cannot confer judicial power upon a Court. When it creates a Court it is the Con-

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stitution which invests the Court and Judge with judicial power, and makes the Court a constitutional tribunal. As soon as the Court thus becomes a constitutional tribunal, the Constitution intervenes and imposes a barrier to any legislative interference with the term of office, its tenure, or the salary of the Judge, and this barrier is intended to be a prohibition of any legislative exercise of power, except by the constitutional grant of the power of removal by impeachment, or a two-thirds vote for cause.

If this is not the correct theory of our Constitution, the provisions securing the independency of the Judge, and the constitutional grant of the power to remove Judges by methods expressed in the Constitution, are all made subordinate by implication to a clause which was merely intended to provide for needs which might arise in the administration of justice, and not intended to be construed as conferring the power to abolish Courts when such exercise of power would operate to destroy prescribed constitutional limitations.

Regretting our inability to avoid the result reached in this case, Judge Beard and I dissent from the views of the majority, and respectfully but earnestly insist that they are in error.

Railroad v. Neely.

RAILROAD v. NEELY.

(*Jackson.* May 24, 1899.)

1. **NEW TRIAL.** *Refusal of, error, when.*

That there are some substantial facts to support it does not justify a trial Judge in refusing to set aside a verdict with which he is not satisfied on the facts.

Case cited and approved: *Railroad v. Brown*, 96 Tenn., 559.

2. **SAME.** *Rule of Supreme Court.*

The rule that a verdict will not be disturbed upon the facts, if there is any evidence to support it, is one that prevails in this Court, but not in the lower Courts.

Cases cited and approved: *Tate v. Gray*, 4 Sneed, 592; *England v. Burt*, 4 Hum., 400; *Nailing v. Nailing*, 2 Sneed, 631; *Vaulx v. Herman*, 8 Lea, 683; *Turner v. Turner*, 85 Tenn., 389; *Railroad v. Roddy*, 85 Tenn., 403.

FROM MADISON.

Appeal in error from Circuit Court of Madison County. A. H. MUMFORD, Judge.

HAYS & BIGGS for Railroad Co.

S. J. EVERETT for Neely.

CALDWELL, J. R. B. Neely brought this action against the Nashville, Chattanooga & St. Louis Railway Co. to recover from it \$15,000, as damages

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for personal injuries alleged to have been by it wrongfully and negligently inflicted upon him while rightfully and cautiously disembarking from one of its passenger trains, at the end of his journey thereon. The jury trying the case returned a verdict for \$7,500. The plaintiff remitted \$5,500. The Court pronounced judgment for \$2,000, and the defendant appealed in error.

The bill of exceptions contains the following statement, namely: "The defendant moved the Court for a new trial upon the several grounds set out in the entry on the minutes, and, after argument of counsel, the Court stated that he was satisfied that the verdict of the jury was excessive, and that the verdict should be set aside upon that ground; and that it was unnecessary to consider the ground that the verdict was not supported by the testimony and was contrary to the law and evidence. Thereupon the plaintiff requested the Court to state what amount he thought would not be excessive, when the Court stated that, if the plaintiff was entitled to any amount, he was not entitled to more than \$2,000, but that there could be no doubt but that \$7,500 was excessive. Whereupon counsel for plaintiff stated that he would remit \$5,500 of the verdict, making it \$2,000. The Court then overruled the motion for a new trial, *stating that the facts in the case were considerably mixed, but that it was a rule of his to rarely invade the province of the jury in setting aside their verdicts,*

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if there were any substantial facts to support the same."

The concluding part of this recital, which we have italicized, discloses erroneous action on the part of the Court. It shows a misconception of the respective functions of the Court and jury in regard to the evidence, and gives unwarranted weight to the verdict. It was incumbent on the trial Judge, in passing upon the motion for a new trial, to weigh the evidence for himself, and decide whether or not the verdict, when reduced to \$2,000, was warranted thereby; and it would not have been an invasion of "the province of the jury" for him to have done so. It was his province, and his alone, to decide that question. The case had passed from the jury, and had reached that stage in which the Judge must approve or disapprove the verdict; and, "in discharging that exclusive and independent duty, he must, unavoidably, determine for himself, after giving all due weight to the verdict of the jury, whether or not the evidence introduced was sufficient to sustain that verdict." *Railroad v. Brown*, 96 Tenn., 559.

His Honor seems to have gone far enough, in his consideration of the evidence, to conclude that there were some "substantial facts to support" the verdict, and, deeming that sufficient, he considered the evidence no further. That was a misapplication of a familiar rule, of long standing in the practice of this Court, but wholly inapplicable in *nisi prius*

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Courts. Indeed, that rule, as here applied, is based upon the fact that both the trial Judge and the jury have carefully weighed the evidence, and that, while doing so, they have had more favorable opportunities of ascertaining the truth than this Court can have. *Tate v. Gray*, 4 Sneed, 592; *England v. Burt*, 4 Hum., 400; *Nailing v. Nailing*, 2 Sneed, 631; *Vaulx v. Herman*, 8 Lea, 683; *Turner v. Turner*, 85 Tenn., 389; *Railroad v. Roddy*, 85 Tenn., 403.

The rule is applicable only when the trial Judge has concurred in the finding of the jury, and is never to be applied to a mere verdict.

Reverse and remand.

Railroad v. Tiernan.

RAILROAD v. TIERNAN.

(*Jackson.* May 24, 1899.)

1. RAILROADS. *Fencing track.*

The fences along a railroad right of way, to meet the requirements of the statute on that subject, must be up to the standard at all points, including those at which gates are maintained. (*Post*, p. 706.)

Act construed: Acts 1891, Ch. 101.

Cases cited and approved: *Polk v. Lane*, 4 Yer., 36; *Smith v. Jones*, 95 Tenn., 342.

Cited and distinguished: *Railroad v. Hughes*, 94 Tenn., 450.

2. SAME. *Same.*

The mere erection by a railroad company of a fence, which originally conforms to the standard fixed by the statute on that subject, does not afford it perpetual immunity from liability for stock killed on the track, but to continue its immunity the company is bound to exercise ordinary care to keep the fence, including the gates, in good repair and closed at all points. (*Post*, p. 707.)

Act construed: Acts 1891, Ch. 101.

3. SAME. *Liability for killing stock.*

Since the passage of the railroad "fencing Act" of 1891, it is not essential, in order to exonerate it from liability for the killing of live stock on a lawfully fenced track, that a railroad company shall show, in addition to the fencing of its track, that it has complied with all the requirements for the prevention of accidents on unfenced tracks. (*Post*, pp. 707, 708.)

Act construed: Acts 1891, Ch. 101.

Code construed: § 1574 (S.), § 1298 (M. & V.), § 1166 (T. & S.).

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Cases cited and approved: Railroads v. Crider, 91 Tenn., 489; Railroad v. Russell, 92 Tenn., 108; Railroad v. Stonecipher, 95 Tenn., 313; Smith v. Jones, 95 Tenn., 342.

FROM MADISON.

Appeal in error from Circuit Court of Madison County. LEVI S. WOODS, Judge.

McCORRY & BOND for Railroad.

CARUTHERS & MALLORY for Tiernan.

CALDWELL, J. A train of the Mobile & Ohio Railroad Co. ran upon and killed a mare and colt belonging to John Tiernan. He sued the company for damages and obtained verdict and judgment for \$100. The company appealed in error.

At and near the place of collision the road of the company passed over the land of one Taylor. The track was fenced on both sides, and gates were put in for the convenience of Taylor, the owner of the land. The testimony submitted to the jury was conflicting as to the character and legal sufficiency of certain portions of the fence, and it failed to show with certainty the precise point at which the mare and colt entered the inclosure. Several objections are urged against the charge and rulings of the Court below. All of these have been considered, and, without mentioning them in detail or

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stating the contentions made on either side with respect to them, we are content to give our conclusions in brief form as to the most important questions raised.

1. The trial Judge, after defining the requisites of a lawful fence, rightly instructed the jury, that, to render the inclosure legally sufficient, the gates, forming parts of it, "must be as substantial as other portions of the fence, for the purpose of keeping out stock."

Clearly, a gate that is less effective in turning away stock than the whole fence is required to be, does not meet the demands of the law. A fence, like a chain, is no stronger than its weakest part.

2. He also rightly said to the jury, that, if the proof showed that the inclosure was insufficient "at any place along, at, or near where the animals were killed, and where stock were likely to enter, then the company would be responsible," though the proof should not show the point at which these particular animals entered.

This instruction, like the preceding one, lays down the correct proposition that the inclosure, to meet the statutory requisites of a lawful fence, must be up to the standard at all points. It is in accord with *Polk v. Lane*, 4 Yer., 36, approved in *Smith v. Jones*, 95 Tenn., 342. The present case is not analogous to that of *Railroad v. Hughes*, 94 Tenn., 450, nor is the foregoing proposition inconsistent with anything said in that case.

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3. Again, the jury was rightly charged, in substance, that if a third person left one of the gates open, and the mare and colt entered through it while so open, the company would be responsible, if it knew, or by the exercise of ordinary care could have known, that the gate was open, and that it would not be responsible if it did not have, or by the exercise of ordinary care could not have had, such knowledge. This instruction is entirely correct and is fair to both sides. The mere erection of an inclosure, sufficient in the first instance, did not afford the company perpetual immunity; but, to continue its protection against liability, the company was bound to exercise ordinary care to keep the inclosure in good repair and closed at all points—the gates as well as other parts of the fence.

4. But the trial Judge committed error against the company in that part of his charge in which he said: “If the jury should be of opinion that the track was properly fenced, and that the animals got into the inclosure and upon the track and were killed, then the railroad company would be responsible for running its engine upon them, unless it can show, by a preponderance of the evidence in the case, that it used all the statutory precautions” laid down in Subsec. 4 of § 1166 of the Code (M. & V., § 1298; Shannon, § 1574), in reference to a lookout on the locomotive and the sounding of the whistle, putting down of brakes, and the employment of every possible means to stop the train when

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animals appear upon the track. This instruction was erroneous, in that it imposed upon the company the burden of showing an observance of "all the statutory precautions," even though it might appear to the jury that the company at the time of the collision had its track inclosed by a lawful fence. That part of the charge relating to the observance of statutory precautions should have been omitted altogether, and the liability or nonliability of the company should have been made to turn upon the absence or presence of a lawful inclosure of the track. The "fencing act" (Ch. 101, Acts 1891) greatly modifies and in a large measure supersedes the previously existing law. *Railroads v. Crider*, 91 Tenn., 489; *Railroad v. Russell*, 92 Tenn., 108. The second section of that Act makes railroad companies absolutely liable for injury caused to live stock by moving trains upon unfenced tracks, and the third section gives them complete exoneration from liability for such injury upon fenced tracks. The nonliability in the latter case is as complete as the liability in the former. *Railroad v. Russell*, 92 Tenn., 111. Since the passage of that Act, proof with reference to the observance or nonobservance of the "statutory precautions" referred to is irrelevant in actions like the present one. *Ib.*, 110; *Railroad v. Stonecipher*, 95 Tenn., 313.

The effect of the charge of the learned Circuit Judge was to give the plaintiff the benefit of two independent remedies (one under the Code and the

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other under the Act of 1891) in the same action, and to allow the railroad company no escape whatever, except upon proof of full compliance with both laws at the same time. A result so unequal and partial was not contemplated by the Legislature and should not be approved by the Courts. 92 Tenn., 113, 114.

Reverse and remand for a new trial.

Medlin v. Balch.

MEDLIN v. BALCH.

(Jackson. May 27, 1899.)

1. DAMAGES. For detention of cow.

One who detains another's milch cow that has broken into his premises is liable for the damages resulting from such detention.

2. VERDICT. Not excessive.

A verdict of three dollars for the unlawful detention of a milch cow, for a short period, is not so excessive as to evince prejudice or passion, or to indicate that anything was allowed for the owner's mental anguish over his loss.

FROM MADISON.

Appeal in error from Circuit Court of Madison County. LEVI S. WOODS, Judge.

HAYS & BIGGS for Medlin.

W. G. TIMBERLAKE for Balch.

WILKES, J. Mr. Balch's milch cow, in some unaccountable way, broke into a lot where Mr. Medlin kept his cattle. The cow not coming up to be milked at her accustomed time, Mr. Balch inquired for her, and hired a man to look for her, and

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advertised for her in the *Jackson Sun*. The advertisement appears to have been inserted in the *Sun* under the idea that it was constructive notice to the world. Mr. Medlin saw the cow in his pen, but supposed Mr. Pope, his partner, had bought her. Mr. Pope saw the cow in the yard, and supposed that Mr. Medlin had bought her. In the meantime neither of them appears to have looked at the *Sun*. After some two or three days, in a conference between the two, it was ascertained that neither had bought the cow. Mr. Medlin then tried to find the Ranger, to post the cow, but the Ranger was out on the range, and appears to have been as hard to find as was the owner of the cow. In the meantime Mr. Balch and his family were suffering for milk, and he was in great mental anxiety for his cow. Some two weeks afterwards a gentleman called at the yard and demanded the cow, but Mr. Medlin refused to deliver her except on an order from Mr. Balch. It seems fairly inferable, from this fact, that Mr. Medlin had heard she was Mr. Balch's cow. On production of Mr. Balch's order the cow was delivered. Mr. Medlin met Mr. Balch a short time afterwards and explained to him that he had kept the cow up to find out who she belonged to. This does not appear to have satisfied Mr. Balch, and he sued Mr. Medlin for damages before a Justice of the Peace for meddling with his cow. The Justice, after mature deliberation, gave a judgment for the plaintiff, and the defendant ap-

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pealed to the Circuit Court. The case was there tried before the Court and a jury, and, after a full hearing, there was a judgment in favor of the plaintiff for three dollars and the costs. The judgment was not an excessive one, but the costs had come to be a matter of more consequence than either the damages or the cow, and so the defendant promptly appealed to this Court, and assigns quite a number of errors.

The case was elaborately presented by two of the ablest counsel of the Jackson bar in arguments that were extended, learned, and exhaustive, at least to the Court, and, after mature deliberation and earnest consultation, this Court has reached a conclusion. The trial Judge charged the jury, in substance, that, so long as Mr. Medlin believed his partner had bought the cow, he was not in error in keeping her in his yard, but when he found out that his partner had not bought her, and that she was somebody's milch cow that had got into his lot, he ought to have turned her out and let her go home to her calf, and in that way she would have reached her owner.

The trial Judge seems to have proceeded on the idea that the cow would find her owner more promptly than Mr. Medlin would, and we are of opinion that this was good common sense, and he was not in error in this view of the case. Common sense is always good law, but law is not always common sense. The jury gave a verdict for \$3. We do not consider this so excessive as to evince

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prejudice or passion, and we will not disturb it on this ground. The advertisement and hire of man to make a search were legitimate items to look to in fixing the damages. Nothing seems to have been allowed for Mr. Balch's mental anguish.

The defendant asked the Court to give some additional charges to the jury, but we think (1) that they are not good law, and (2) the Judge charged the jury correctly, and the jury charged defendant enough for this kind of a case, when the amount of costs is considered.

The judgment is affirmed.

Hamilton v. Henney Buggy Co.

HAMILTON v. HENNEY BUGGY CO.

(*Jackson*. May 30, 1899.)

1. REPLEVIN. *Proper judgment on the several bonds.*

A judgment of this Court upon affirming a judgment of the Circuit Court, which affirmed a judgment of a Justice of the Peace for defendant in replevin, will, if all the bonds are in the penalties required and sufficient, be against plaintiff and his original sureties for double the value of the property, to be satisfied by its return, and for the damages and cost, and also against the sureties on appeal from the Justice to the Circuit Court for the same measure of relief, and against the sureties for the appeal to the Supreme Court only for costs and damages, consisting of interest on the recovery, but the judgment against the sureties on the Justice's appeal bond must be limited to cost if the bond is so limited, and the recovery on the original replevin bond must be limited to the amount of its penalty.

Code construed: §§ 5152, 5144 (S.); §§ 4133, 4126 (M. & V.); §§ 3397, 3390 (T. & S.).

2. SAME. *Same. Acts 1885 construed.*

Acts 1885, Ch. 59, does not affect or contemplate any change in the form or substance of an original judgment for defendant in replevin. That Act simply contemplates and provides for a supplemental judgment, not extinguishable, in whole or in part, by return of the property for any part of the original judgment that may remain unsatisfied upon the return of the first execution thereon.

Act construed: Acts 1885, Ch. 59.

Cases cited: *Nighbert v. Hornsby*, 100 Tenn., 82.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby County. LEVI S. WOODS, J.

Hamilton v. Henney Buggy Co.

J. E. POPE and ELI FRIEDLOEB for Hamilton.

CARUTHERS MALLORY for Buggy Company.

SNODGRASS, Ch. J. This is a replevin suit in which there was judgment below for defendant. On appeal here the judgment was affirmed, and the question arises as to what is the proper judgment here against principal and sureties below and sureties on appeal to this Court.

This suit commenced before a Justice of the Peace, and proper judgment therein by him to be rendered is provided for in § 3397 of the Code (M. & V., § 4133; Shannon, § 5152). This section, it will be seen, contemplates judgment for the property, and, if plaintiff fails to deliver it up, further judgment for double the value of the property. This did not necessitate two judgments. Construction has made the form of it to be that “defendant recover of plaintiff and his sureties \$— (double the value of the property replevied), but to be satisfied by a return of the property;” and also for damages for detention, and cost. The latter, of course, not to be satisfied otherwise than by payment. And, accordingly, execution runs. In cases of replevin originating in the Circuit Court, judgment in favor of defendant was provided for in § 3390 of the Code (M. & V., § 4126; Shannon, § 5144). It was for return of the property, or on failure, that the defendant recover the value of the property, with interest thereon, and damages for any detention. There is, therefore,

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under this section, a judgment for the value of the property, to be satisfied by its return, and, further, for the interest and damages, not to be satisfied except by payment.

It will be observed, however, that in both these sections of the Code no provision was made for any judgment not in this alternative form, so that from term to term of Court executions might run always, at least in part extinguishable, by a return, however late, of the property. The Legislature deemed this an omission needing to be supplied, and the Act of 1885, Ch. 59, was passed for this purpose. It in terms amended the last section cited (Sec. 3390) by providing that if such alternative judgment was rendered, and execution issued thereon and was returned, showing that the property had not been returned and the execution had not been satisfied in whole or in part, the defendant was then entitled to a final judgment against the plaintiff and his sureties for the whole of the original judgment, or so much of it as remained unsatisfied, in dollars and cents, and not to be thereafter extinguishable in whole or in part by a return of the property. This was the object and entire scope of the Act of 1885. It made no change in the form or substance of an original replevin judgment, and was not intended to do so.

In the case of *Vigbert v. Hornsby*, 16 Pickle, 82, it was expressly decided that judgment of the Justice and Circuit Court thereon must be as before

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this Act. It was said in that case that "judgment for the penalty of the bond, without reference to the value of the property, is allowable only after the plaintiff has failed to return the property, and the writ of *fi. fa.* so showing has been returned unsatisfied, in whole or in part." This was correct so far as it refers to such execution returned wholly unsatisfied, if the Act applies to a replevin suit originating before a Justice, because it was spoken of a Justice's judgment, or in cases originating before a Justice, which, as we have seen, is for "double" the value of the property, and "double" the value of the property is the penalty of the bond by statute. It would, therefore, follow that if in such a case a *fi. fa.* had been issued and returned, showing the property adjudged to defendant was not delivered, and the execution in whole unsatisfied, the final judgment would follow unconditionally for double the value of the property, which would be the penalty of the bond. But, if the execution was returned in part satisfied, this judgment would be for such double value or penalty, less the amount collected on the execution. This Act was discussed in that case, but was not applied, as the case was not one calling for its application. The statute in terms applies only to judgments rendered in cases originating in the Circuit Court. Whether it must be also applied to cases appealed there from Justices we need not now decide, as we are not called upon to apply it at

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all. The judgment rendered in the Circuit Court was not the second or absolute one authorized by the Act, and, therefore, the Act can have no application.

As to the judgment to be rendered here: It is the same as the Circuit Court (in case of appeal from a Justice of the Peace) should have rendered against plaintiff and his original sureties—for double the value of the property (to be satisfied by its return), and for the damages and costs, and, also, against sureties on appeal from the Justice to Circuit Court for the same, and against sureties on appeal to this Court only for costs and damages, consisting of the interest on the recovery. There is no statute requiring bond for more than damages and cost on appeal to this Court in replevin suits. This is all upon the assumption that the bonds of this record are in the penalties required, and sufficient; but we find no appeal bond from the Justice in the record. There is a recital in the judgment of the Circuit Court of an appeal bond, but only for costs. The penalty of the original bond was only \$300. The property was proven to be of the value of \$175. So, as against the sureties on Justice's appeal bond, the judgment must be limited to costs of the appeal to the Circuit Court, and, as against those on the original replevin bond, the recovery must be limited by amount of its penalty. Judgment will be accordingly entered.

Whitelaw Furniture Co. v. Boon.

WHITELAW FURNITURE CO. v. BOON.

(*Jackson*. May 27, 1899.)

EVIDENCE. *Burden of proof.*

The burden is upon the seller, who, having under a condition of the contract of sale, reclaimed the property on account of the buyer's failure to pay the full price, is afterwards sued by the latter for that part of the purchase money paid before reclamation, to prove, in order to protect himself, strict compliance with the provisions of Acts 1889, Ch. 81, with reference to the advertisement and resale of the property.

Act construed: Acts 1889, Ch. 81.

Code construed: § 3669 (S.).

Cases cited: 32 Ala., 557; 35 Ark., 430; 50 Ga., 103; 53 Iowa, 84.

FROM MADISON.

Appeal in error from Circuit Court of Madison County. LEVI S. WOODS, Judge.

W. G. TIMBERLAKE for Whitelaw Furniture Co.

HUNTER WILSON for Boon.

BEARD, J. The Circuit Judge in this case charged the jury that where a vendor in a conditional sale has reclaimed property from his vendee, because of the failure of the latter to pay the full purchase money as provided in the contract of such sale, and is afterwards sued by the vendee for that part of the purchase money paid before reclamation,

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that the burden of proving a compliance with the requirements of Sec. 4, Ch. 81, of the Acts of 1889 (§ 3669 of Shannon's Code), was upon the defendant. Upon regaining possession of property so sold, the statutory duty of within ten days thereafter advertising the same for sale in the manner prescribed by the Act, is imperative, and a failure to discharge this duty in any important particular makes the vendor so reclaiming liable to the original purchaser for the part of the consideration theretofore paid. Whether he has complied with the provisions of the statute in making this sale is peculiarly within the knowledge of the original vendor. He knows better than any one when and where he posted the notices announcing the sale, and whether it occurred at the time and place designated in the notices, and in placing this burden on him the Court only applies the rule uniformly adopted in cases where defendants are prosecuted for selling liquor without license. In such cases, that the defendant has a license is a fact lying particularly within his own knowledge, and as proof of it can easily be made by him, the duty of furnishing it is imposed upon him, rather than proof of the negative upon the prosecutor. *Farrell v. State*, 32 Ala., 557; *Williams v. State*, 35 Ark., 430; *Conyers v. State*, 50 Ga., 103; *Nocker v. Peoples*, 91 Ill., 468; *State v. Miller*, 53 Iowa, 84.

There was no error in the action of the trial Judge and his judgment is affirmed.

Smith v. State.

SMITH v. STATE.

(*Jackson.* May 27, 1899.)

JURY. *Incompetent juror.*

A juror is not competent to serve in the Criminal Court of a county if he has within two years served as a juror in the Circuit Court of that county.

Code construed: §§ 5793, 5799, 5800, 5821 (S.); §§ 4756, 4763, 4764, 4785 (M. & V.); §§ 3981, 3988, 3989, 4010 (T. & S.).

Case cited and approved: *State v. Goodwin*, 13 Lea, 238.

FROM MADISON.

Appeal in error from Criminal Court of Madison County. JOHN M. TAYLOR, Judge.

J. M. TROUTT for Smith.

Attorney-general PICKLE for State.

WILKES, J. Defendant is convicted of receiving stolen goods, and sentenced to six months' confinement in the county jail, and has appealed and assigned numerous errors. Only one of these need be mentioned.

After the defendant had exhausted all of his challenges, E. S. Harris was tendered to him as a

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competent juror. On his examination on his *voir dire*, Mr. Harris stated that he had served on the regular jury in the Circuit Court of Madison County, as one of that body, within twelve months next before the time he was offered on this trial. Defendant challenged him for this cause. The Court disallowed the challenge, and Mr. Harris served upon the jury. Defendant excepted to the ruling of the Court, and assigns it as error. This assignment is well made. Under the statute (Shannon, § 5793) it is provided that the County Court shall appoint jurors for the next term of the Circuit Court, but no person shall be summoned or serve on the venire who has served on a venire for a period of two years preceding. By § 5799 it is provided that no Court shall appoint any person to serve as a juror more than one time in each period of two years, either on the original panel or to fill a vacancy therein. By § 5800 it is provided, that, if any juror is appointed in violation of these provisions, the Court shall discharge him and appoint a juror in his stead free from exception, and, by § 5821, this previous service is made ground for challenge. If, therefore, this juror had been offered in a cause pending in the Circuit Court, in which he had previously served, he would have clearly been incompetent. Does it alter the case that he is offered in the Criminal Court of the same county instead of the Circuit Court? It was held in *State v. Goodwin*, 13 Lea, 268, that a juror who had served

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upon a panel in the Circuit Court of Shelby County could not be compelled to serve another term, within twelve months, in the Criminal Court of the city and county. In like manner, and on the same principle, such prior service is good ground for peremptory challenge, and the trial Judge was in error in selecting the juror and requiring him to serve over defendant's exception. See, in accord, *Corvossin v. Raymond*, 23 Col., 113.

The judgment is reversed, and the cause remanded for a new trial.

Ward v. State.

WARD v. STATE.

(Jackson. June 8, 1899.)

1. PLEA IN ABATEMENT. *Strictness required.*

The greatest strictness is required in pleas in abatement, and no intendment is made in their favor. They must contain a full and positive averment of all material facts. (*Post*, pp. 726, 727.)

Case cited and approved: *Grove v. Campbell*, 9 Yer., 7.

2. SAME. *Not sufficient, when.*

A plea in abatement to an indictment for forgery is fatally defective, for want of certainty in its averments, which alleges that defendant had been extradited, and was still held, under another charge of forgery pending in the same Court, without stating the name that had been forged or identifying the indictment that had been the basis of the extradition otherwise than by a general reference to the records of the Court, in which numerous indictments for forgeries were pending against defendant. (*Post*, pp. 726, 727.)

3. EXTRADITION. *Defendant not entitled to benefits of, when.*

Although the extradition of a party has been agreed upon by the two countries, still, if he is not delivered in accordance with that arrangement, but is caught by the accredited agent of this country at a port in a neighboring State, on board an American ship, sailing under an American flag, while voluntarily making his way back to this country, he is not entitled to any of the benefits of extradition. (*Post*, pp. 726, 727.)

4. CHARGE OF COURT. *Not part of record.*

The Court's charge and the requests for further instructions, though copied into the transcript, are not part of the record unless they are, by some appropriate language, made part of the bill of exceptions. (*Post*, pp. 727, 728.)

5. JUROR. *Opinion.*

Although a juror states he has no opinion in the particular case on trial, he is nevertheless incompetent if he had formed and

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expressed an opinion adverse to defendant from an attentive reading of a newspaper report of the evidence delivered on a former trial of defendant on a similar charge, which included an accurate report of material evidence to be used in the pending case, introduced on the former trial to show scienter. (*Post*, pp. 728-737.)

Cases cited: *Woods v. State*, 99 Tenn., 186; *Spence v. State*, 15 Lea, 539.

6. SAME. *Same*.

And, in such case, it is error for the Court to refuse to permit counsel to examine the juror touching such newspaper report. (*Post*, pp. 728-737.)

7. SAME. *Challenges*.

This Court will reverse for the error of compelling the defendant to take an incompetent juror, over his objection and offer to challenge for cause, when it appears that defendant exhausted his full number of peremptory challenges on other objectionable jurors. (*Post*, pp. 728-737.)

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby County. L. P. COOPER, J.

GEORGE B. PETERS for Ward.

Attorney-general PICKLE and M. R. PATTERSON for State.

BEARD, J. This indictment contains two counts. The first charges Ward with forging S. C. Toof's name on a check, and the second with passing this check, knowing the indorsement of Toof's name was

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forgery. He was found guilty under the second count, and his term in the penitentiary fixed at five years. When called to answer the indictment, the plaintiff in error filed a plea in abatement, in which he averred that he was extradited from Spanish Honduras, under a proper process of extradition by an agent of the United States, for the "offense of forgery alleged to have been committed by him in Tennessee; that an indictment was found against him in the Criminal Court of Shelby County for the forgery for which he was extradited, as appeared from the record from said Court, which is asked to be considered as a part hereof, and the same is now pending and has never been tried." He then avers that he cannot be tried on the present indictment until he is tried for the offense for which he was extradited. After certain other pleadings, the trial Judge struck out this plea, and, we think, properly. The greatest strictness is required in pleas in abatement, and no intendment is made in their favor. "They must contain a full and positive averment of all material facts." 1 Enc. Plead. & Prac., 23; 9 Yer., 10. Tested by this well-established rule, this plea was fatally defective. It leaves blank the name of the party for forgery of which Ward was indicted, and also fails to identify in any way the indictment which was the basis of the extradition.

The plaintiff in error contents himself with referring to the "record of the Criminal Court for this

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indictment, and, when found, asks that it be considered'' as a part of this plea. This vital defect is sufficient answer to the error assigned to this action of the trial Judge; but another answer, equally conclusive, is furnished by the record, and that is, that plaintiff in error was never extradited in the sense of the rule invoked by his counsel. While it is true that this government did ask, on the ground of international comity, the authorities of Spanish Honduras to deliver Ward for extradition, and though those authorities indicated to our Minister resident at the capital of Spanish Honduras their willingness to surrender Ward to an accredited agent of the United States, and this agent did bring Ward back, yet the facts are that the agent found Ward outside of Spanish Honduras, at a port in a neighboring State, on board an American ship, sailing under an American flag, returning, as Ward says, "voluntarily to this country." This is clearly a case falling within the rule announced in *Ker v. Illinois*, rather than that enforced in *United States v. Rausch*, 119 U. S., 407.

Numerous errors are assigned upon the charge of the trial Judge, and upon his refusal to grant certain special requests submitted by the attorneys of the plaintiff in error. Many interesting questions have been argued at the bar growing out of these assignments, but they are not considered or determined by us, as neither charge nor request are properly brought into the bill of exceptions. At

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the conclusion of the evidence used in this case is found the usual statement, "this was all the evidence in the case," and, on the next succeeding page, begins, without any introductory clause to identify it, what purports to be the charge, simply beginning, "Gentlemen of the jury." This is not sufficient. There must be something to make certain the charge as that of the Court in the particular case, such as the formula given by Judge Caruthers in his History of a Lawsuit, "and hereupon the Court charged the jury as follows," or some equivalent thereof. It is the duty of the trial Judge, in signing the bill of exceptions, to identify, by his signature, or in some other unmistakable form, the charge which he gives, and the special requests he acts upon, and make them a part of the bill of exceptions by proper indorsement, or else see that they are embodied in the bill of exceptions, and thus leave nothing open to conjecture on the record.

The serious error, however, in this case arises upon the action of the Court with regard to one Holden, tendered as a juror. On his *voir dire* he was examined upon the question of opinion and prejudice, and he stated that he had been a close reader of the *Appeal*, containing report of proceedings of the former trials of Ward for forgery, and had formed an opinion that he was guilty of feloniously using Mr. Toof's name, and that it was only reasonable that he should have the same opinion

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still; but that as to this case he had no opinion. The attorney of Ward then proposed to submit to the juror a copy of the *Commercial-Appeal* of the second of November, containing a report of the testimony of Mr. Toof in one of those former trials. This, upon the objection of the Attorney-general, was refused by the trial Judge, who pronounced the juror competent, and, thereupon, the prisoner, through his counsel, peremptorily challenged. Having exhausted all of his challenges, he sought to challenge two other objectionable jurors presented to him, but the trial Judge declined to permit him to do so. The plaintiff in error is in this record in a condition to complain of the action of the Court below.

The *Commercial-Appeal* presented by the prisoner's counsel contained a full report of Mr. Toof's testimony. Among other matters testified about by this witness were a series of checks given by one Pollard, to the order of S. C. Toof, on the Union & Planters' Bank, of which the check which is the basis of indictment and conviction was one, and he pronounced them all forgeries. In addition, in that case, as he does in this, he gave a reason why his name was a forgery—that at the date of this check he was in Cuba, and could not, therefore, have indorsed it.

We think, in view of the fact that Holden had stated positively that he had read closely the report of these trials in the *Appeal*, that, for the purpose

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of testing his qualification to sit in this case, the prisoner's counsel was entitled to examine him on that report. In addition, it is clear the opinion which this juror had formed was a disqualifying one, and that he could not qualify himself by saying that he could give the prisoner a fair trial. An opinion formed from a personal knowledge of the facts, or from hearing witnesses state them, or from reading in any newspaper a report of the statements of actual witnesses, is a disqualifying one. *Woods v. State*, 15 Pickle, 186; *Spence v. State*, 15 Lea, 539.

Holden fell within the rule which disqualifies, and the trial Judge was in error in forcing the prisoner to challenge him peremptorily. For this reason, the cause is reversed.

PETITION TO REHEAR.

We have been asked by the State's representatives to reconsider our former holding as to the action of the trial Judge in pronouncing one Holden a competent juror, and thus forcing the defendant to exhaust upon him one of the peremptory challenges.

In disposing of this case, we held him to be a disqualified juror upon the ground that he had formed an opinion that the accused was guilty of forgery, from what Holden characterized as a close reading by him of the reports of a former trial of Ward as they appeared in the *Commercial-Appeal*.

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It is true that these reports were of a trial for another forgery than that charged in the present case; and it is also true that this would not have been a disqualifying opinion, formed, as it was, in another and a collateral case, except that the check, the alleged forgery of the name of S. C. Toof upon which is the basis of the indictment in this case, was made a subject of investigation and testimony in that case. This check was issued by one Pollard for the proceeds of a note discounted for Ward, payable to the order of Mr. Toof, on the Union & Planters' Bank, and, as claimed by the State, uttered by Ward after he had feloniously placed the name of the payee upon it. A copy of the *Commercial-Appeal* newspaper, containing a most elaborate and detailed reproduction of testimony delivered by Mr. Toof as a witness in that case, then in process of trial, was brought into the bill of exceptions, and constitutes a part of the record in this cause. The newspaper report of his testimony as to the Pollard notes and checks (for there were many of them, including the one in question) was as follows: "The State then showed the Pollard paper to witness, who said he was in Cuba when it was made. It purports to have been made in Memphis. Other Pollard notes were shown. Witness said his signature appearing on these notes was not genuine, and he got no money from them. The money on these notes was given by Pollard in the shape of checks, payable to S. C. Toof. Wit-

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ness said he had indorsed none of these checks, and did not draw or receive the money on them. His signatures thereon were forged. He never saw the checks until after Ward's flight. Witness did not do business with the bank where they were cashed, but Ward did."

That this report was accurate is shown by its complete correspondence with what Mr. Toof testified in this case as to those same notes and checks. He repeats in this what he had so positively sworn in the former case—that all the indorsements on these notes and checks of his name were forgeries—and states here, as he did there, as a confirmatory reason for his swearing as to the indorsement complained of in this case, that he was in Cuba when it was made. It is upon the reading of this testimony, and that of other witnesses to the fact, that Holden, as he confessed, had formed an opinion "adverse to the defendant"—an opinion which he says he had "expressed several times; a good many times," and that he "had this opinion still." It is certain that, if Holden had been present in court at the delivery of this testimony, or if, in conversation with him, Mr. Toof had made a similar statement to that reported in the newspaper, his opinion of Ward's guilt, formed therefrom, would have disqualified him from sitting on the jury in the present case, and this disqualification could not be removed by a mere statement that he had no opinion in this case.

While opinions resulting from rumors, whether

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repeated from mouth to mouth or found in newspapers, will not disqualify, it is otherwise as to opinions based on the statement of witnesses to the fact, no matter when made or how reported. As was said in *Spence v. The State*, 15 Lea, 539, "Newspaper reports, to disqualify a juror, must be such as fall within the disqualifying sources of information and purport to be detailed by those who professed to know the facts. Any other statement would only amount to rumor, whether in parol or printed." In *Woods v. State*, 99 Tenn., 182, it was said: "An impartial jury is one composed of twelve impartial men. The presence of one partial man in a jury destroys the impartiality of the body and makes it partial. *Ellis v. State*, 92 Tenn., 100. Any disqualification which makes one member partial brings the jury, as such, within the prohibition of the fundamental law, impairs one of the highest and most sacred rights of the accused, and vitiates any verdict of guilty in which the partial member may participate. A man who has prejudged the case upon its real facts is necessarily partial, and, therefore, incompetent to sit as a juror at the trial. An opinion as to the guilt or innocence of the accused, however, is not always a disqualification. Those opinions which are based upon personal knowledge of the facts of the case, or upon a statement of the facts made by the witnesses themselves, or by others who have heard the witnesses relate them, disqualify." And such is the holding of many of the Courts.

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Among the cases announcing this rule of disqualification, are *Brown v. State*, 70 Ind., 576; *State v. Jackson*, 37 La. Ann., 768; *State v. Culton*, 82 Mo., 623; *Rose v. State* (Wash.), 26 Pac. Rep., 214; *Mabry v. State*, 71 Miss., 716.

But it is said that the copy of the *Commercial-Appeal* containing the report was not sufficiently identified. The paper was offered, and the attorney of the prisoner insisted upon submitting it to Holden for the purpose of examining him with regard thereto. From this, however, he was erroneously, but peremptorily, cut off by the trial Judge, upon objection by the Attorney-general. No question was made as to the identity of the newspaper or the authenticity of the report. No such question was suggested in the Court below, but evidently it was excluded upon the argument presented in this Court, that to permit this report to be read by the juror was to create a disqualification, when none then existed, an argument made in the teeth of the fact that the hostile opinion which had disqualified him was formed from reading the report.

Before concluding, it is not improper to say that, unless this Court is prepared to disregard its plain and unmistakable duty to see that all defendants charged with crime, however great or small, shall have a fair and impartial trial, the chief factor in which is an unprejudiced jury, the conclusion heretofore announced should be maintained. The law allowing the challenges was not made by us, but

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by the Legislature. The statute giving the defendant a certain number of peremptory challenges not only is a permission to him to exercise the right, but it is a mandate to us and inferior Courts, which compels their allowance. If, therefore, one charged with crime has been made to exhaust his peremptory challenges on incompetent or disqualified jurors, who should have been excluded for cause, this statutory right has been taken away from him, and, unless it is within the power of this Court to authorize such a deprivation, we cannot do so. It is not only not permitted to us to do this, but the legislative grant to him is of a right that neither this nor any other Court in this State can take away.

This Court is given jurisdiction to see, among other things, that citizens arraigned for crime are fairly tried under the law and according to its forms and directions. We make neither, nor have we the authority to change either. We can no more deny a defendant, guilty or innocent, one right than another. If we should have the power to say, because we might at any time think a defendant guilty, that he would be deprived of one constitutional or statutory privilege, we could say that he should be deprived of others or of all such privileges. If we have the power to say he might be forced to trial before a partly prejudiced or incompetent jury, we could say he might be tried before one wholly prejudiced or incompetent, or without a jury at all. If we could say that he could be

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tried with one less challenge than the statute allows, we could say that he could be tried with two less, or without any. We have no such power, and it is mere mockery to talk of this Court denying a defendant any legal right of the character indicated, or refusing to see that he was not allowed such right in a trial below, and at the same time denominate it a revising Court, constituted wholly to see that cases and individuals are tried below under and according to the form of law.

The power to try criminals is vested in Courts solely because persons, charged as such, can there be surrounded by the safeguards of law, and have punishment meted out to them only when their guilt has been established, after an open and fair prosecution, met by an open and fair defense. It is not merely a question of guilt or innocence of the accused. If so, the proceedings of a mob, which visits swift punishment without any of the protective forms of law, upon guilty persons, are correct, because a merited result is speedily and economically reached. Organized society, however, has always agreed that this cannot be allowed, but that the accused must be properly charged, be given full opportunity and facilities for defense, have a fair trial by an impartial jury, according to fixed rules, and be convicted only when his guilt is made out beyond all reasonable doubt. The mob, by an enlightened public opinion, is condemned because of its disregard of all these. But what could be justly

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said of Courts which would do likewise, and how much less culpable would they be if they so nearly approached the methods of a mob as to refuse the accused any one of the vital demands essential to a fair trial, and execute or condemn according as they might will in a particular case? Compared to such conduct in Courts, mob violence is praiseworthy, for the mob, at least, has no trust to trample on or judicial oaths to violate, or judicial order and propriety to outrage. If any Court should knowingly lend itself to the punishment of any citizen not properly tried and convicted, it would fall to the level of the unlicensed mob, to the ruin of its own influence and to the shame of the country. To the honor of our Courts, superior and inferior, they have never done any such shameless work, and, as long as they remain honest, will not do so.

Petition dismissed.

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